UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES

CONSOLIDATED BUS TRANSIT, INC.	**2-CA-34661**
	2-CA-34865
	2-CA-35072
	2-CA-35107
and	**2-CA-35117**
	2-CA-35166
	2-CA-35230
	2-CA-35259
	2-CA-35946
LOCAL 854, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO	
and	**2-CB-19125**
JONA FLEURIMONT and JOSE GUZMAN, Individuals	
CONSOLIDATED BUS TRANSIT, INC.	
	2-CA-35373
and	**2-CA-35378**
	2-CA-35397
	2-CA-35486
TEAMSTERS FOR A DEMOCRATIC UNION	
LOCAL 854, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO	
	2-CB-19265
and	**2-CB-19555**
TEAMSTERS FOR A DEMOCRATIC UNION	
CONSOLIDATED BUS TRANSIT, INC. AND LONERO BUS TRANSIT, INC., A single Employer	
AND	**2-CA-36492**
TEAMSTERS FOR A DEMOCRATIC UNION	

Burt Pearlstone, Esq. and Terry Cooper, Esq. **for the General Counsel**
Richard I. Milman, Esq. and Michael Mauro, Esq. ***(Marshall M. Miller Associates, Inc.)*** **of Lake Success, New York, for Consolidated Bus Transit, Inc.**
George Kirschenbaum, Esq. and Walter Kane, Esq. ***(Cary Kane LLP)*** **of New York, New York, for Local 854**
Julian J. Gonzalez, Esq. **of Detroit, Michigan, for Teamsters for a Democratic Union**

DECISION

Statement of the Case

ELEANOR MACDONALD, Administrative Law Judge: This case was tried in New York, New York on 15 days between March 22 and July 21, 2004, with the exception of Case 2-CA-36492. Following the settlement and severance of a case which had been consolidated with the above-captioned cases, the record was closed on November 3, 2004. On March 15, 2005, upon the Motion of the General Counsel, the hearing was reopened and the Complaint in Case 2-CA-36492 was consolidated for hearing with the other above-captioned cases. The reopened hearing took place in New York, New York, on four days from May 9 to May 12, 2005.

I shall sever, for purposes of issuing the decision, Case No. 2-CA-36492 from all of the above-captioned cases. The decision in Case No. 2-CA-36492 will issue separately.

On August 9, 2004, Counsel for the General Counsel made a written offer of proof in support of Rejected General Counsel Exhibits # 63a, # 63b, # 64a and # 64b. That offer of proof is hereby admitted at ALJ Exhibit # 3a. Respondent Consolidated's response to the offer of proof dated August 16, 2004 is hereby admitted as ALJ Exhibit # 3b. The response of Local 854 dated August 17, 2004 is hereby admitted as ALJ Exhibit # 3c.

On March 30, 2005 Respondent Consolidated served a Motion to Strike certain portions of Counsel for the General Counsel's Brief. That Motion is hereby admitted as ALJ Exhibit # 4. The General Counsel's Opposition to the Motion, dated April 11, 2005 is hereby admitted as ALJ Exhibit # 5.

One basis for Respondent Consolidated's Motion to Strike portions of General Counsel's Brief was an Order dated August 6, 2004 both admitting and rejecting certain General Counsel exhibits. (That Order was admitted into evidence as ALJ Exhibit # 1.) Rather than adopting the cumbersome procedure of striking portions of the Brief, I have decided not to consider the many references and quotations in General Counsel's Brief to any of the Rejected Exhibits. These Rejected Exhibits include General Counsel's Exhibits # 27, # 63a and # 63 b, # 64a and 64b.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all the parties on March 18, 2005, I make the following[1]

[1] The record is hereby corrected so that at page 17, line 11 and wherever the word "Sariva"
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Findings of Fact

I. Jurisdiction

Respondent Consolidated Bus Transit, Inc., a New York corporation with an office at 50 Snedecker Avenue, Brooklyn, New York and a location at Zerega Avenue, Bronx, New York, is engaged in providing school bus services to the New York City Department of Education and to private schools in New York City. Respondent Consolidated annually derives gross revenues in excess of $250,000 and purchases and receives goods and supplies valued in excess of $5,000 directly from suppliers located outside New York State. The parties agree, and I find, that Respondent Consolidated is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. I also find that Local 854, International Brotherhood of Teamsters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act and that Teamsters for a Democratic Union (the TDU), is an organization comprised of rank and file members of the International Brotherhood of Teamsters which exists to reform the International Brotherhood of Teamsters.

II. Alleged Unfair Practices

A. Background

The parties agree that the following individuals are supervisors and agents of Consolidated:

Joseph Curcio	President
Anthony Strippoli	Chief Operations Manager
Joseph Antoci	Director of Safety
Vito Mecca	Safety officer in the Bronx

In addition, the evidence shows that the following employees of Respondent Consolidated perform certain managerial and supervisory functions:

Maria Toya	Manager of Human Resources during the relevant period
Tommy Doherty	Terminal Manager in the Bronx

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appears, the correct address is “Zerega Avenue”; at page 32, line 15, the word “maintenance” should be replaced by “matrons”; at page 59, line 18, the record should show that Mr. Pearlstone was speaking, not Mr. Kirschenbaum; at page 60, line 3, the last phrase should read “you were not waiting”; at page 276, line 16 the answer is “September”; at page 471, line 1 and thereafter in the record, the correct term is “Project RISE”; at page 520, line 8 and thereafter the person’s name is “Jose Villarin”; at page 759, line 3 and thereafter, the word “disparage” should be replaced by the word “disparate”; at page 936, line 17, the last phrase should read “that they could not give it when they want to”; at page 999, line 16, the last word is “doff”; at page 1002, line 15, the phrase is “I did not have it with me”; at page 1086, line 14, Mr. Milman was speaking; at page 1154, line 12, the sentence should read, “This is our petition to change shop stewards.”; at page 1206, line 20, the word “August” should be replaced by the word “Albany”; at page 1285, line 3, the first word is “shape”; at page 1708, line 3, the phrase should read, “He was gesticulating.”; at page 1807, line 12, the last phrase should read “for them going to the Board”.

Bill Ronecker	Safety officer in the Bronx

The parties agree that the following individuals are agents of Local 854:

Daniel Gatto	President
Joel Mora	Vice President
Ann Stankowitz	Secretary Treasurer
Ronald Nigro	Shop Steward until June 19, 2002
Anthony Evaristo	Union Organizer

Local 854 has represented the employees of Respondent Consolidated for many years and has been party to a series of contracts with Consolidated the latest of which is effective from July 1, 2002 through June 30, 2005 for a unit defined as follows:

> All drivers, escorts, van drivers, helpers and mechanics, excluding guards and supervisors as defined in the Act.

Each of the company's school transportation vehicles accomplishes its runs with one driver and one escort, occasionally referred to as a "matron." The duties of an escort are to help children on and off the bus, to make sure the children are seated with their seatbelts fastened and to prevent fights among the children.

Respondent Consolidated operates out of three yards in the Bronx which are identified as Zerega Avenue, Fordham Road and Longfellow Avenue. The buses in the Bronx yards cover routes in the Bronx and Manhattan. The company's corporate headquarters are located at Snedicker Avenue in Brooklyn. Other yards are located in Brooklyn, but employees working out of the Brooklyn yards are not at issue herein.

President Joseph Curcio began operating Respondent Consolidated in 1979. Curcio also operates two other companies, Borough Transit, Inc., and Lonero Bus Transit, Inc., both of which do business under the name Consolidated Bus Transit. Borough Transit and Lonero are signatories to collective-bargaining agreements with Local 1181, Amalgamated Transit Union. Altogether, the three companies employ about 2000 school bus drivers and escorts. Local 854 represents about 50% of these employees.

Anthony Strippoli has been the chief of operations since 1979. He is responsible for both the Bronx and Brooklyn operations. Strippoli's office is at Snedicker Avenue in Brooklyn, but he goes to the Bronx every morning at about 5:30 AM. Strippoli first goes to the second floor office at Zerega Avenue and then downstairs to the yard. Strippoli returns to the main office in Brooklyn at 8 or 8:30 AM. Strippoli's job is to make sure the runs are covered in a timely manner. He deals with public officials, and with parents, teachers and principals. Nine or ten company dispatchers in the Bronx and Brooklyn report to Strippoli. Although Strippoli testified that he helped draft corporate policy, it is not part of his duties to deal with the Union.

The drivers and escorts of Respondent Consolidated at issue herein work on buses which transport pupils pursuant to contracts entered into by the Respondent with the New York City Department of Education, Office of Pupil Transportation.[2] The employment of drivers and

[2] The Department of Education is the new name given to the old Board of Education following a change in the structure and governance of the New York City educational system. Through force of habit many of the witnesses herein still referred to the "Board of Education" in

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escorts is highly regulated in order to insure pupil safety. Drivers must complete defined training and testing requirements. After they are hired, drivers must complete two annual refresher courses and three annual safety classes. Drivers and escorts may work for Consolidated only upon approval of the Office of Pupil Transportation. Extensive paperwork must be completed and filed with the Office of Pupil Transportation when a driver or escort moves from one company to another company providing school bus services. These documents include an official form of resignation from one employer and an official form permitting employment by the new employer.

Local 854 president Daniel Gatto began working for the Union in 1993 as a business agent. He became president in 1999. In 1993 Ron Nigro was the Local 854 shop steward for the Bronx location of Respondent Consolidated. Eventually the members requested an election and Victor Galermo ran against Nigro and was elected shop steward. Another election saw Nigro reelected. Since 1993 there have been a total of four or five shop steward elections. Gatto testified that the practice had been for the shop steward to serve without an assistant. However, when Nigro's son became very ill and was hospitalized Nigro asked for help. Joel Mora had shown an interest in the Union and Gatto appointed him assistant shop steward.

The collective-bargaining agreement between Local 854 and Respondent Consolidated was negotiated by a committee led by Gatto and Secretary/Treasurer Ann Stankowitz and comprising 10 unit members including both drivers and escorts. These employee representatives were elected by vote of the bargaining unit. The contract was ratified by a secret ballot vote.

Gatto testified that the Union represents 600 unit members in the Bronx yards. This number is equally divided between drivers and escorts.[3]

Stankowitz services the shop at Respondent Consolidated. The employer does not automatically send copies of all disciplinary actions to the Union. Stankowitz hears about such matters when a member phones to complain or company safety officer Joe Antoci calls to set up a disciplinary hearing.

The primary business of Respondent Consolidated takes place during the school year from September through June. During the summer months Respondent operates some summer routes and performs some charter trips. School bus drivers select their routes on the basis of seniority at an event called "a pick". Shop stewards have super-seniority. The pick for the school year routes, known as the fall pick, takes place in late August. The pick for the summer routes takes place at the end of June. Because the company operates far fewer routes in the summer, drivers with relatively high seniority who do not wish to work a summer route need not do so. If not enough people volunteer for summer runs then the work becomes mandatory in inverse order of seniority.

The testimony of the drivers shows that they typically arrive at their designated yards from 6:15 to 6:30 am. Drivers are paid for working from 6:30 am to 5 pm, with 2 ½ hours off during the day, a total of 40 hours per week. If they work past 5 pm they receive overtime pay. The paid workday includes time for a "pre-trip inspection" of the vehicles that drivers are

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their testimony.

[3] Local 854 represents 300 to 400 other employees of Consolidated in Brooklyn. The Union has a total of 2200 members. Respondent Consolidated is the Union's largest shop.

supposed to perform every morning before they go out on the road.[4] The drivers' testimony herein shows that typically a driver finishes his morning run picking up children and delivering them to school within two or two and one-half hours of departure from the yard. Then the driver is free until he must pick up the children at school in the afternoon and take then home. Driver Juan Carlos Rodriguez testified that he actually drove about 20 to 25 hours per week, with occasional additions for vehicle inspections, vehicle washing or safety classes, and he was paid $805 per week. Driver Jose Guzman left the yard at 6:30 am and returned around 8:45 am. He was free until he left the yard again at 1:30 pm and he returned with his bus at 4 pm. Driver Jose Estevez, who earns $829.65 per week, testified that he begins work at 6:30 am and finishes his route in 1½ to 2 hours. In the afternoon his route takes 2 to 2 ½ hours to complete.

The General Counsel asserts that the Respondent's drivers at the Zerega yard were unhappy with their wages and benefits which they believed to be lower than the wages and benefits received by drivers at other companies owned by Curcio who were covered by a contract negotiated with Local 1181. Further, Respondent's drivers believed that Respondent should be paying them extra for jobs transporting disabled adults for United Cerebral Palsy.[5] According to General Counsel the drivers believed that the Local 854 did not address their grievances and they sought the assistance of the TDU. Then the drivers petitioned for a shop steward election. It is the General Counsel's position that as a result of these activities the drivers were subject to threats, discipline and other coercive activity by Respondent Consolidated and that there were a number of unlawful discharges or constructive discharges.

In addition, the General Counsel alleges that Respondent Local 854 engaged in coercive behavior and unlawfully failed to pursue a grievance on behalf of driver Jose Guzman.

Gatto's testimony offered a different explanation for the actions of those unit members who sought the assistance of TDU. Gatto described a Teamster program called "Project RISE" which was put in place by Edwin Stier, a former prosecutor. The project was embodied in a committee that devised a program to promote ethics and responsibility in union officials. Project RISE performed a field study of various Teamster locals. For the study of Local 854 Gatto was interviewed by a former FBI investigator who also interviewed members of the union who both approved of and disapproved of Gatto. Project RISE issued a report that was favorable for Local 854. The report concluded that Local 854 had rid itself of the influence of organized crime. Gatto thinks he is a "poster boy" for Project RISE. Gatto believes that the TDU attacked him because the TDU is an opponent of Teamster president Hoffa and Gatto is a symbol of success for the Teamsters. Gatto recalled that at a Local 854 meeting in November 2002 he read portions of the favorable Project RISE report. Gatto learned that driver Jose Guzman had complained about him to Project RISE when investigators for Project RISE contacted him in the fall of 2002.

Because of the many and diverse facts presented in the instant hearing it is not possible to give a purely chronological recitation of all of the events. Rather, I shall group most of the relevant events by subject matter in an attempt to lend some coherence to the discussion.

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[4] Juan Carlos Rodriguez stated that he and the other drivers do not perform the comprehensive pre-trip inspection. However, Driver Jose Guzman testified that he does a pre-trip that takes two or three minutes each morning. Driver Raymond Figueroa always does a pre-trip that takes five or ten minutes. Driver Jose Estevez stated that he does a five minute pre-trip inspection every day before taking his bus out.

[5] The United Cerebral Palsy work is referred to as "UCP runs."

B. Contacts with TDU and Meetings at La Pena

Driver Juan Carlos Rodriguez was employed by Respondent Consolidated from January 1993 to March 27, 2003.[6] He worked out of the Bronx Zerega yard during the last year of his employment. Rodriguez testified that he believed that employees of Curcio's companies represented by Local 1181 received higher wages than those specified in the Local 854 collective-bargaining agreement. In February 2002 Rodriguez met with certain co-workers who wanted to effect changes at work: these individuals were Victor Irizarry, Raphael Perez, Jose Naranjo, Jose Estevez and Renzo Lopez. Rodriguez contacted TDU in March or April 2002.[7]

In March, April and May 2002 Rodriguez was a leader and organizer of from four to six meetings held at La Pena, a location he described as a Latino organization in the Bronx. Other leaders were Consolidated drivers Jose Guzman, Jona Fleurimont and Jose Naranjo. From 45 to 75 drivers employed by Respondent Consolidated attended these meetings. Among these was driver Raymond Figueroa.[8] Rodriguez recalled that the drivers discussed wage rates and were given information about their *Weingarten* rights. Rodriguez stated that he spoke up at the first meeting and explained the "abysmal" difference between the Local 854 and Local 1181 contracts.[9] Rodriguez had heard from members of Local 1181 that they earned about $100 more per week than members of Local 854; he did not know whether this included extra work or overtime. Guzman's testimony confirmed that the perceived difference in wages between the 854 contract and the 1181 contract was the "Number 1" issue for the drivers who met at La Pena and was the thing they most wanted to change.[10]

Driver Jona Fleurimont attended meetings at TDU and at LaPena where the drivers decided to petition for a new shop steward.[11] Fleurimont stated that the change he and others wanted was the same collective-bargaining agreement as Local 1181. Fleurimont acknowledged that he had never seen the 1181 contract and was not familiar with its provisions relating to wages, health insurance, pension, holiday pay, and the like. Fleurimont did not know the 1181 pay scale but a friend had told him it was favorable. At the time he testified herein, Fleurimont was working for an employer signatory to a Local 1181 contract. Nevertheless, Fleurimont maintained that he did not know what, if anything, his employer contributed to the pension. Indeed, Fleurimont was not able to contrast the 1181 benefits to those he had enjoyed while working for Respondent Consolidated because he did not know what the Local 854 contract provided in pension contributions, health insurance or paid holidays.[12]

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[6] Rodriguez testified through an interpreter. Rodriguez speaks English and he reads "The New York Times" in English. During the hearing Rodriguez persisted in correcting the official interpreter's English translations of his answers given in Spanish. Rodriguez constantly sought to add hearsay matter to his testimony. I have disregarded all the hearsay that Rodriguez injected into his answers.

[7] Rodriguez and some of the other employees joined TDU. The record does not disclose the precise timing of these memberships in all cases.

[8] Figueroa joined the TDU in October 2002.

[9] Rodriguez testified that he has never seen the 1181 contract and he does not know what it provides in the way of benefits, pensions, health insurance and the like.

[10] Guzman said he had never looked at the Local 1181 contract.

[11] Fleurimont is not Hispanic.

[12] In general, Fleurimont recalled very little except what he himself wanted to testify about. Fleurimont recalled that he won the 2002 shop steward election by getting 171 votes. But Fleurimont testified that he did not recall if he ever drove a charter run, he could not recall when he left the Consolidated yard in the morning to begin work and he could not recall when he

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Apparently none of the drivers who contacted the TDU in spring 2002 and became active in the drive to replace the Local 854 shop steward had been active in Local 854 before the shop steward election. Guzman had not been to a Union meeting before September 2002. Although Fleurimont testified that he attended Local 854 meetings in the spring of 2002, his testimony about arriving there on a bus with other drivers, an event which actually occurred in the fall, and his general lack of the ability to place events in the correct time frame convince me that his testimony was in error. In fact, Fleurimont later testified that the first Local 854 meeting he attended was in September 2002.

Rodriguez testified that the organizers of the La Pena meetings invited only those employees "we trusted" to the meetings. Local 854 shop steward, Ron Nigro, was not asked to the meetings. However, in August 2002 Local 854 president Gatto was invited to a meeting at La Pena and he appeared with Union organizer Anthony Evaristo. Drivers present included Rodriguez, Fleurimont, Guzman, Jose Naranjo, Renzo Lopez, Nicolas Garcia, Angel Garces and Victor Irizarry. The topic at this meeting was the drivers' desire to be paid extra for the UCP runs and their insistence that the Union take this issue to arbitration. Rodriguez referred to the UCP runs as a "double route" problem. He stated that the work should have been paid at Local 1181 rates because it was really 1181 work. Gatto told the drivers that the collective-bargaining agreement called for eight hours work per day and they had to do the work assigned by the company.

C. 2002 Shop Steward Election

Summary

At some point in their La Pena meetings and their meetings with TDU, the drivers decided that they wanted to elect a new shop steward. Rodriguez testified that their candidate was Jona Fleurimont. Guzman telephoned Gatto in April or May 2002 and asked him how to get rid of the shop steward. Gatto replied that he would need the signatures of one more than 50% of the unit members on a petition.

On May 20, 2002 a petition was delivered to Local 854 by driver Renzo Lopez asking for a shop steward election to be held in the last week of May or the first week of June. The form had a heading on the first page of signatures which stated the purpose of the petition. Five

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picked up the first student. He was unable to give an approximation of the time required to drive his route in the morning or the afternoon. Every other driver who testified herein was able to give this information without hesitation. Fleurimont served as shop steward at Consolidated yet on cross-examination he stated that he did not know what progressive discipline was and he could not recall whether he filed grievances on behalf of unit members other than himself. He could not say whether Local 854 provided grievance forms. He could not recall whether he had ever written out a grievance form without the aid of TDU. Fleurimont was uncooperative on cross-examination, repeatedly fencing with counsel and refusing to answer questions. Fleurimont pretended not to understand common words and terms. I cautioned Fleurimont on the record to listen to the questions and answer them and I instructed him not to interject anything he pleased into the record. This direction had no effect on his testimonial conduct. Fleurimont repeatedly gave long, rambling, unresponsive answers. He often resisted attempts by the ALJ and various Counsel to obtain answers to the questions that were actually before him. I conclude that Fleurimont did not understand the importance of answering accurately and fully under oath and that he was not a reliable or credible witness. I shall therefore not rely on Fleurimont where his testimony is contradicted by other reliable testimony or evidence.

more pages of signatures were attached, but there was no heading on these pages. In effect, most of the signatures were on pages that did not state the purpose of signing. This petition was rejected by Local 854 and Gatto told Lopez that there had to be a heading on each page of the petition. Fleurimont testified that the drivers went to the TDU to have another petition made up with a heading on each page. On May 30, 2002 the drivers delivered a new signed petition in the proper form to the Union. The shop steward election was held on June 19, 2002. The ballot contained two names: Ronnie Nigro and Jona Fleurimont. Fleurimont won the election by garnering 171 votes to Nigro's 51.[13] Fleurimont appointed Guzman to be his assistant shop steward.

The General Counsel alleges that Respondent Consolidated engaged in unfair labor practices in connection with the shop steward campaign.

Campaign

Guzman recalled that in late May 2002, after the first petition was delivered to the Union there was a meeting in the Zerega yard attended by Gatto and Stankowitz. Guzman put the attendance at about 60 drivers. Gatto explained that there had been a problem with the first petition saying some people did not know what they were signing. Fleurimont urged the drivers to chant, "We want change." Angel Garces told Gatto that the company owed drivers two years of profit sharing. Garces recalled that Gatto replied that he would consult the lawyer. Rodriguez testified that about 70 employees were at this meeting. He recalled that Fleurimont spoke, criticizing the Union for not defending workers from company harassment. While Fleurimont was speaking some employees began chanting "we want a change" and then "disorder set in." Fleurimont recalled that this meeting was held in June 2002. He encouraged the employees to tell Gatto they were waiting for a shop steward election. Gatto testified that this meeting took place in early June. He informed the employees that there would be an election. Although the exact timing of this meeting is not important, it is significant because it took place in the Zerega yard in full view of the company's second floor office windows. Thus, those attending the meeting and speaking out would be known to anyone in the yard or the office on that day.

The signatures for the two election petitions were collected by various drivers in April and May 2002. This activity also took place openly in and around the Bronx yards of Respondent Consolidated. Rodriguez testified that he and others collected signatures in the yard in the morning and afternoon before taking their vehicles out of the yard. The others who were active in this effort were Jose Naranjo, Renzo Lopez, Nicola Garcia, Victor Irizarry, Johnny Salgado and Jose Estevez. Rodriguez was with the group that carried at least one of the petitions to the Local 854 office. This group included Salgado, Irizarry, Guzman, Fleurimont and Jose Naranjo. Rodriguez testified that terminal manager Tommy Doherty, whose office is on the second floor overlooking the Zerega yard, watched the petition effort. At one point Tommy came into the yard and observed the drivers collecting signatures. On cross examination Rodriguez acknowledged that he did not actually collect any signatures but he stood at the gates and spoke to drivers about the petition as they entered. Driver Jose Estevez testified that he stood in the middle of the yard with the petitions and that Rodriguez, Guzman, Fleurimont, Figueroa, Naranjo and Felipe Bourdier assisted in the petition effort. Fleurimont recalled that he encouraged other employees to sign the petition.

Guzman testified that he gathered signatures for the petitions in the yard at Zerega and

[13] Apparently a majority of the 600 unit members did not vote in the shop steward election.

in the drivers' room both before he began work, during the midday break and after work. Others who assisted were Estevez, Rodriguez and Fleurimont. Guzman said that managers and supervisors walked by while signatures were being collected. These included Strippoli, Vito Mecca, Bill Ronecker and Doherty. In addition, drivers posted flyers in the drivers' room, the cafeteria and outside on light poles and the walls of the yard. These included Fleurimont, Rodriguez, Estevez, Figueroa, Garces and Lopez. Guzman testified that on one occasion he and Figueroa were distributing fliers in the yard when Strippoli told him that he did not want leaflets distributed in the yard.

On direct examination by Counsel for the General Counsel, Figueroa testified that he helped collect signatures on both petitions for a shop steward election in the spring of 2002. He stood at the gate of the Zerega yard and across the street from the yard asking people to go over to sign the petition being held by Estevez. He could not tell whether a member of management saw him doing this. On cross-examination Figueroa stated that he only collected signatures for the second petition for a shop steward election and only for 20 or 30 minutes.[14]

Estevez testified that on one occasion while he was collecting signatures he was approached by the then shop steward Ron Nigro who asked him what the petition was for.[15] Nigro was actually preparing to sign the petition. When Estevez said it was a petition to hold an election for a new steward, Nigro said, "You don't like me." Estevez replied that the petition was motivated by another reason: Nigro had many years in the position and the people wanted to see a change.

Estevez testified that one day while collecting signatures in the yard at around 6:20 am he was approached by Strippoli.[16] Strippoli instructed Estevez to report to Strippoli's Brooklyn office after he had finished his morning rounds. Estevez asked shop steward Nigro to accompany him because he wanted Union representation. When Strippoli met with Estevez and Nigro he began by asking whether Estevez was happy at the company. Estevez said he was happy. Strippoli continued that he could get Estevez a job in another company. Then Strippoli asked who was behind the petition. Estevez told Strippoli to have a meeting with all the drivers if he wanted to know who was behind the petition. Strippoli said he would find out who was behind the petition and when he found out they would not be dismissed, they would be arrested. Anyone who supported the petition would be arrested. Strippoli said the drivers might do something to lead to a strike. Estevez had made a tape recording of the meeting with Strippoli and the tape was used to refresh his recollection. The tape contained voices of people yelling and talking over each other. It was not clear to the ALJ who was speaking. Rather than admit the tape and deal with the inability of the parties to agree on a transcript, the ALJ directed Counsel for the General Counsel to replay the tape for Estevez during a break in his testimony and then to draw his attention to the subjects dealt with by the tape.[17] After having his memory

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[14] It appears that certain witnesses may have exaggerated Figueroa's protected activities.

[15] Estevez testified through an interpreter. He often began to answer the questions before the interpreter had completed the translation. Estevez speaks and understands English.

[16] This event occurred around May 17, 2002.

[17] General Counsel's Brief renews the request to admit this tape, Rejected General Counsel Exhibit # 27, into evidence. I shall deny this request. The voices on the tape are hard to identify, it is hard to hear what is being said and it would require a great effort to prepare an accurate transcript. The transcript offered by General Counsel and rejected by me purports to identify the speakers but it was prepared by someone who works for a transcription agency. That transcriber, or course, does not know any of the people purportedly speaking on the tape. Estevez was able to testify about the incident in sufficient detail. I shall disregard those portions

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refreshed by listening to the tape, Estevez recalled that he had asked Strippoli why he was being followed by the company while driving his routes. Strippoli replied that it was customary and that management could follow anyone.[18]

Strippoli also testified about this encounter and he gave varying and contradictory testimony about the petition for a shop steward election. When questioned by Counsel for the General Counsel pursuant to 611 (c) of the FRCP, Strippoli said he had heard there was a petition at Zerega for a new shop steward. Strippoli also said he did not see the petition being handed out and that he did not recall speaking to employees about the petition. Although Strippoli said he did not recall speaking to Estevez about the petition he acknowledged that he might have told Estevez that the petition is against the law. When Estevez' tape was played in an attempt to refresh Strippoli's recollection, Strippoli said it sounded like his voice on the tape. When questioned by Counsel for Respondent, Strippoli was unable to recall anything except in response to leading questions. The ALJ cautioned Counsel that responses to leading questions would be disregarded. Strippoli, who stated that his responsibilities do not include dealing with the Union, said that he was aware of a petition before the shop steward election but he thought it was for a job action because it was being handled secretively. He also testified that no one told him about the petition but, "I might have found a copy floating around." Later, Strippoli stated that he never saw the petition but a worker must have told him about it. He could not recall what the petition was when asked by Counsel for Respondent. The above is a sharply curtailed recitation of the internally contradictory and unbelievable testimony given by Strippoli about the shop steward petition and his conversation with Estevez. As is abundantly clear from the record, signatures for two petitions were solicited openly in the Bronx yards by a number of employees acting in concert. Strippoli saw Estevez with the petition in the middle of the yard and summoned him to a meeting in Brooklyn where he asked whether Estevez was happy and offered to find him a job elsewhere. Strippoli asked Estevez who was behind the petition and then threatened those employees with arrest. Strippoli did not deny offering to find Estevez another job. Strippoli did not deny asking Estevez which other employees supported the petition. Strippoli did not deny telling Estevez that he would find out the identities of those behind the petition and have them arrested. I shall not credit any of Strippoli's testimony on this subject.

Once the election was set, Rodriguez was active posting signs in and around two of the Bronx yards and in the drivers' room at the Zerega yard. On one occasion, Doherty stood at the gate holding some these posters which he then gave to Jose Naranjo and Angel Garces. Rodriguez recalled that Raymond Figueroa, Nicholas Garcia and Renzo Lopez were also active handing out campaign fliers.

After the election Strippoli asked Guzman who won and the latter replied that Fleurimont and he had won. Guzman told Strippoli he ran as an assistant shop steward. Guzman testified that Strippoli said Guzman was a phony and that he and others were trying to bring in Local 1181. Strippoli said Fleurimont went to 1181 and that it was illegal to sign a petition to bring another union to the company. Strippoli said Garces, Naranjo and Estevez were "lawyers" who make trouble for everyone. Strippoli added that Guzman and Fleurimont should read the contract and see what they could do for the people. Strippoli said he did not care who the shop

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of General Counsel's Brief that quote the tape or refer to it in any way.

[18] Although Estevez did not recall certain details he was asked about and had to have his memory aided by having his attention drawn to certain subjects and by listening to the tape recording, I am convinced that he answered to the best of his recollection. I shall credit Estevez and rely on his testimony with respect to this incident.

steward was as long as the seniority list for the summer pick was brought up to date. Guzman testified that during this conversation Strippoli said it was illegal to distribute material on the property and, "We were lucky that he didn't see who it was because he would have thrown us out no matter who."

Discussion of Alleged Unfair Labor Practices

The General Counsel urges that Strippoli coercively interrogated Estevez, threatened to discharge employees for supporting the petition for a shop steward election and threatened to arrest employees for supporting the petition for shop steward.

The Board has stated that, "It is well settled that Section 7 encompasses the right of employees to oppose the policies and actions of their incumbent union leadership and to seek to persuade others to take steps to align the union with these opposing views." *Mobil Oil Exploration*, 325 NLRB 176, 178 (1997).

I find that Strippoli saw Estevez collecting signatures for the shop steward election petition and summoned Estevez to his Brooklyn office to discuss the petition. Strippoli asked Estevez who was behind the petition. Thus, Strippoli, the second highest official of Respondent Consolidated, was questioning Estevez about the employees' Union activities at a specially convened meeting in company headquarters. Strippoli coupled this interrogation with a query whether Estevez was happy in his job and a suggestion that Strippoli could get him a job elsewhere. This was a clear suggestion that Strippoli could put an end to Estevez' job with Consolidated if he showed he was not "happy" by trying to change the status quo through a petition for a shop steward election. Thus, Strippoli was making a not very veiled threat that Estevez would be discharged for engaging in Union activities. Finally, Strippoli told Estevez that when he found out who else supported the petition they would be arrested, making an overt threat to cause the arrest of employees who engaged in Union activities. The threat to discharge Estevez and the threat to cause the arrest of other employees confirm the coercive nature of Strippoli's interrogation. I find that Respondent violated Section 8 (a) (1) of the Act by coercively interrogating Estevez about his Union activities, threatening him with discharge for engaging in those activities and threatening to have employees arrested for engaging in Union activities. *Rossmore House*, 269 NLRB 1176 (1984).

D. Controversy over UCP Runs

Employee Activities

Gatto testified that in the middle of the 2001-2002 school year the company informed him that it had obtained a small amount of work related to United Cerebral Palsy runs. Drivers had picked their routes for the school year without advance knowledge of the UCP runs. Now, the UCP work would be assigned to drivers who had not chosen to do it. As a result, the company offered to pay extra compensation for UCP runs performed during the regular eight hour work day. Gatto met with the drivers in the Zerega yard when this issue came up. He explained about the extra compensation offered for UCP runs during the remainder of the school year. Gatto informed the drivers that when they next picked their routes for the following school year, some runs would include UCP work. Since drivers pick runs by seniority, those drivers with the most seniority would avoid picking the routes that included extra work for UCP. After the next pick, Gatto explained, drivers would have a choice, depending on seniority, whether to do the extra work or not. In consequence, once the runs were chosen by the drivers they would no longer receive extra compensation. Instead, UCP work would involve extra pay

only if it qualified as overtime beyond the normal eight hour work day specified in the collective-bargaining agreement. Gatto testified that the drivers and the Union agreed to this arrangement for UCP runs. However, after the new school year of 2002-2003 began some unit members wanted to seek extra pay for the UCP runs. Gatto told the drivers that they had agreed to a way to handle the UCP runs and they should stick to it. But some drivers demanded that the Union take the issue to arbitration even though Gatto thought they would lose. Eventually Local 854 took the issue to arbitration and the arbitrator awarded in favor of the company. The arbitrator found that UCP runs were not comprehended in the term "double runs" as used in the collective-bargaining agreement. He based his decision on both the language of the contract and the actions of the Union in 2001 and 2002.

Guzman's recollection did not contradict Gatto's detailed explanation of the UCP run issue. Guzman recalled that before the 2002-2003 school year began Gatto was invited to a meeting at LaPena attended by about 30 drivers. Gatto explained that the company would not pay extra for the UCP routes. Gatto informed the drivers that he had spoken to the Union lawyers and they said there was no case. Guzman and Rodriguez insisted that the company had to pay more and Rodriguez gave an explanation with respect to the contract language. One driver accused Gatto of "sleeping in the same bed" with Curcio. Gatto was angry at this comment and said he would take the case to arbitration.[19]

Gatto recalled that during this meeting someone questioned the recent appointment of Joel Mora as vice president of the Local. Gatto said that Mora was a good Union member who attended meetings and helped people with their problems. Gatto explained that he wanted Mora as vice president.

Guzman testified that the drivers room at the Zerega yard contained two bulletin boards for, respectively, Local 1181 and Local 854 information. Guzman testified without contradiction that non-company documents were commonly posted on the walls of the drivers' room for diverse purposes such as to advertise trips to Atlantic City and to announce the holding of a party or the sale of various items.

Guzman identified a flier that he and Estevez, Rodriguez, Garces and Figueroa had posted and distributed. The flier, prepared by TDU, informed Local 854 members that, "The company is violating the contract by forcing some workers to perform double runs without paying them the proper rate. We are filing a grievance to demand that the company stop this practice and pay the workers the money they are owed." Fleurimont denied that he had posted any fliers; he had distributed them in the yard.

On September 30, 2002 Respondent Consolidated suspended Guzman and Fleurimont for one day for posting fliers on the wall of the drivers' room.

On the same day as the suspensions Guzman, Fleurimont, Rodriguez, Estevez and Figueroa posted and distributed another flier prepared by TDU protesting the suspensions and urging members to attend the Local 854 meeting on October 1 to protest the suspensions and seek action about the problem of double runs.

Also on September 30, Guzman and Fleurimont sent Gatto a TDU-drafted letter informing him of the suspensions, providing six reasons why the suspensions violated the

[19] Guzman, who served as a shop steward while employed by the company, testified at the instant hearing that he did not know that it costs money to take a case to arbitration.

contract and the law and demanding that Local 854 take certain actions detailed in the letter. Stankowitz testified that she informed Guzman that she had received the letter and she called the company to be sure that Guzman and Fleurimont were returned to work the next day. Guzman tried not to answer questions posed by Counsel at the instant hearing concerning the Union's actions with respect to this matter. He refused to say whether the Union processed his grievance. The documentary evidence shows that a grievance hearing was held on October 4, 2002. Gatto and Evaristo represented Fleurimont and Guzman. Antoci represented the company. The company agreed to remove any indication of the "unjust suspension" from the personnel files of Guzman and Fleurimont and to make them whole for pay. At the Union's request Antoci "apologized for any inconvenience or actions that the company may have taken against Fleurimont and Guzman."

In early October 2002 Rodriguez posted a flier in the drivers' room and other locations announcing a regional TDU conference in New York City. Rodriguez testified that the poster was no longer in the drivers' room a day or two later.

Around October 9, 2002 Rodriguez and other employees saw a notice posted by the company in the drivers' room which stated:

> Attention Employees
>
> There is to be no unauthorized postings anywhere on company property. (sic) This space is for mutually agreed notices between the Union and the Company only. Any notices that are posted without the company's consent will be promptly taken down.

On October 11 Rodriguez found a one page flier on the driver's seat of his bus. The document is undated and does not identify the author and there is no evidence of its provenance. The flier states:

> Listen Fella
> Don't get involved with these Dominicans. They're trouble-makers who never had it any better than this job. In their country they'd be starving. They try to get other people involved with their problems in the company, but all they care about is themselves. They are very selfish people. Don't trust them. Protect your job.

Rodriguez is from Argentina while most of the other TDU activists are Dominican.

Discussion of Alleged Unfair Labor Practices

The General Counsel contends that Respondent Consolidated suspended Fleurimont and Guzman on September 30, 2002 for their Union activities. The company's animus against the TDU activists is supported by the findings made above as well as discussion in subsequent portions of this decision. The company's opposition to the shop steward petition process is also detailed above. Fleurimont was elected shop steward and Guzman was appointed his assistant. Although Fleurimont and Guzman were suspended for posting fliers in the drivers' room the record contains no proof that they actually did so. The fliers that had been handed out and posted around the company premises discussed efforts to file a grievance and obtain more money for "double runs", an effort connected to the TDU supporters. At the grievance hearing on October 4 the company admitted that the suspensions of Guzman and Fleurimont were "unjust" and the two were made whole and issued an apology. I find that Respondent Consolidated singled out Guzman and Fleurimont for discipline as a result of the employees' protected concerted and Union activity and that Respondent thus violated Section 8 (a) (3) and

(1) of the Act.

E. Other TDU Activities

Local 854 holds membership meetings on the first Tuesday of every month during the school year. The quorum for a meeting is 15 members in good standing.

Guzman testified that in September 2002 he took more than 60 unit members by chartered bus to the regularly scheduled Local 854 meeting. Guzman asked about the UCP arbitration at this meeting. He could not recall what Gatto replied but he recalled that Fleurimont said on this occasion that the company and the Union were working together to damage the members. Fleurimont testified that he complained about both the UCP situation and a problem about "double runs." Figueroa testified that he complained to Gatto that the company was following drivers on their routes and he mentioned the problem of double runs. Figueroa recalled that Fleurimont said workers who want a change were being persecuted.[20]

At the October 2002 Union meeting Fleurimont recalled that he spoke about his suspension and about the problem of "double runs." Fleurimont also talked about the privileges enjoyed by the former shop steward, Ron Nigro. Guzman testified that at the October meeting he asked Gatto about the UCP grievance and he complained that the company had assigned an after school program called Project Reach to certain drivers. Guzman asked Gatto to take this new matter to arbitration. Gatto replied that there had been an arbitration on this subject regarding other drivers and they had lost the case. Figueroa recalled that at the October meeting Gatto said he was presenting a number of grievances.

At the November 2002 Local 854 meeting Guzman and Fleurimont handed Gatto three separate grievances prepared by the TDU on October 18. The first grievance concerned the company's announcement of a rule prohibiting the posting of material in the drivers' room. The second grievance complained that drivers were given Project Reach assignments and it demanded extra pay and other relief. An unidentified notation of the company position at the bottom of the page explains that Project Reach "is not considered doing a double run, it is an 'after school program' of which overtime is paid if incurred." (sic) The third grievance alleged that the previous shop steward had an office and a filing cabinet and it demanded the same and other privileges for the present shop steward. The unidentified company notation at the bottom of the page stated that the previous steward "did not have an office" and responded to the other requests. Apparently, Fleurimont and Guzman had the grievances prepared by TDU and gave them to the company without first consulting the Union. All three of these grievances cited certain portions of the collective-bargaining agreement as having been violated. Gatto told the two stewards that if they had a grievance they should come to the Union and not the TDU. Gatto said that the Union was there to help Fleurimont. The record shows that Gatto provided Fleurimont with a filing cabinet.

On November 19, 2002 Guzman and Fleurimont filed various charges at the Regional Office including an allegation that the Union and the company had broken Fleurimont's car windows. This event will be discussed below.

In November 2002 Guzman and Rodriguez attended a TDU national convention in

[20] Figueroa testified that he attended Local 854 meetings from January 2002 to May 2003. He said that he was allowed to voice all of his criticisms of Gatto and Stankowitz without restraint.

Cleveland. Rodriguez spoke about Project RISE at the meeting and told Stier that the reality was different from his favorable report about Gatto and the Union. Stier said he would look into the allegations concerning Local 854. The next issue of the TDU newsletter contained an article signed by Estevez, Fleurimont, Guzman and Rodriguez which harshly criticized Respondent Consolidated. Notably, the article signed by these unit employees accused the company of "retaliation, sometimes violent" in the form of slashing Estevez' tires, suspending Fleurimont and Guzman, smashing all the windows on Fleurimont's car and threatening to assault Fleurimont. The article accused Local 854 of inaction and indifference and complained that the employees "have had to file every grievance, submit every NLRB charge, draft every flyer… on our own." Significantly, this article did not repeat the allegation that Gatto or Local 854 had violently broken the windows on Fleurimont's car. Guzman and Fleurimont were in contact with Project RISE from October 2002 until April 2003, detailing their complaints that Local 854 was not democratic.

Guzman recalled that at the December 2002 Union meeting Gatto and Stankowitz complained that Guzman had accused them of breaking Fleurimont's windshield. They asked for his proof. Rodriguez testified that at the December 2002 Union meeting he spoke about vandalism to Fleurimont's car.

Fleurimont was discharged in late January 2003. That action is not at issue herein. In early February a number of employees, including Rodriguez, Figueroa and Naranjo, collected money for Fleurimont in both in the yard and at the corner one block away from the yard. Also in early February, Rodriguez and Estevez stood that the entrance to the yard and collected signatures on a petition alleging that Fleurimont's discharge was an unfair labor practice.

Guzman testified that at the January 2003 Local 854 meeting he presented a proposal, signed by a number of employees, to change the Local's by-laws and he told Gatto to read them. Fleurimont and Gatto both testified that Fleurimont presented the by-law amendments.[21] Rodriguez testified that he spoke to Gatto about the proposals before the meeting. Gatto announced that by-law amendments must be supported by seven members in good standing and that he would check to see whether those who signed were indeed members in good standing. Because all by-law amendments must be approved by the International, Gatto also submitted the by-law amendments to the International. There was no quorum at the February 2003 meeting. Gatto read the proposed by-law amendments prepared by the TDU at the March 2003 meeting as well as other amendments proposed by the general executive board of the local providing for an increase in initiation fees.

The record shows that at the April 1 Union meeting Gatto read a letter from the International stating that in their present form the by-law amendments supported by Fleurimont and Guzman were not acceptable.

In the spring of 2003 the Union received a petition signed by unit members requesting that an election be held for shop steward. A shop steward election was scheduled. Guzman was the incumbent shop steward at this time, having been named the assistant shop steward to Fleurimont when the latter was elected. By the spring of 2003 Fleurimont was no longer employed by the company and his discharge was pending arbitration. Guzman signed a letter dated May 1, 2001 but actually prepared on May 1, 2003 requesting that Gatto cancel a

[21] The amendments were prepared by TDU. On January 8 Fleurimont sent Gatto a letter prepared by TDU that discussed the Union by-law procedure for reading the proposed amendments at two consecutive meetings and voting at the third meeting.

scheduled shop steward election because it was "irreparably tainted by employer interference and coercion."[22] Gatto replied in a letter stating that Guzman had not presented any evidence of employer interference and stating that the members had a right to an elected shop steward. In the event, Guzman was elected shop steward on May 3, 2003. Victor Irizarry became the assistant shop steward.

Following the issuance of the instant Complaint dated April 30, 2003, Guzman handed out another TDU prepared flier detailing all of the allegations in the Complaint against the company and the Union. Rodriguez had distributed a flier about the charges after they were filed. Rodriguez stood near the coffee truck on the corner when he did this. Figueroa gave out the flier in the yard along with other TDU supporters.

On May 9, 2003 an article appeared in "The New York Times" which purported to discuss the newly issued Complaint herein. A picture of Guzman and Fleurimont illustrated the story: the two men's names were reversed under the photograph. In addition to discussing the NLRB proceeding the article stated that the company had been "linked to organized crime in the mid-1990's." The article further stated that an internal Teamsters report had found that Local 854 "was dominated by the Gambino crime family from 1950 through 1993." The article went on to say that a "federal oversight board forced out several Local 854 officials a decade ago…. The report also praised Mr. Gatto for aggressively negotiating better contracts and for involving union members in the local's affairs."

Before the May 6, 2003 Local 854 meeting, the Local distributed a notice explaining a by-law amendment submitted by the executive board of the Union which would have increased the initiation and re-initiation fees. The notice explained that the increase would not affect any current member who was working and had paid or was in the process of paying the initiation fee. Guzman responded to this by distributing at the Zerega yard a TDU prepared flier entitled "Local 854 Dues Ripoff!" The flier showed a masked and armed figure putting his hand into the pocket of a victim standing with arms upraised. The body of the flier referred to an increase in initiation fees and urged members to attend the meeting and vote against the increase.[23] Guzman spoke against the increase at the meeting and said that Gatto should not be given more money because the Union was not representing the employees. Guzman helped count the votes and he recalled that the initiation fee increase was defeated with 40 "NO" votes and 35 "YES" votes.

Guzman continued his efforts to pass the by-law amendments he and Fleurimont had developed with the assistance of the TDU. On May 16, 2003 Guzman sent a letter to Gatto demanding that amended proposed amendments be read and accusing Gatto of various types of improper conduct with respect to the amendments. The proposals were supported by the signatures of the following members in good standing: Rodriguez, Guzman, Estevez, Irizarry, Bourdier, Evangelis Marica, Johnny Salgado, Garces, Naranjo and Rafael Perez. The record does not reveal the final fate of these proposals.

[22] The letter contained allegations of employer interference in obtaining signatures for the election. None of these allegations is the subject of a Complaint and there is no evidence that the election process was tainted.

[23] The record contains no explanation for the fact that the flier heading incorrectly referred to an increase in dues.

F. Field Trips

Dispute Over Assigning Field Trips

The Department of Education assigns the drivers of certain routes additional work in the form of driving pupils on their field trips. The Department assigns the trips so that the location of the field trip is close to the regular run of the driver whose route is supplemented by a field trip. No extra compensation is provided for field trips. The contract between the Department and Respondent Consolidated specifies that field trips are a service to be provided by the bus company during the eight hour day. The Department gives the company a list of field trips that are assigned to specific runs. The traditional practice at the company is for the shop steward to take the list of assigned field trips and indicate the assignment on each affected driver's card. Gatto testified that if the Department of Education has assigned a field trip to a route whose driver must attend a medical appointment or take his bus for maintenance, then the shop steward should assign the field trip to another bus driver. Gatto explained that the practice of having shop stewards "do" field trips rather than letting these be adjusted by company dispatchers was supposed to assure the fair treatment of drivers. Gatto has been told by Strippoli that the shop steward can adjust the field trips in his discretion as long as the assignments are covered. There is other testimony on the record to show that the company had at one point told Guzman that he could not make changes to field trip assignments without consulting a dispatcher.

Gatto stated that Fleurimont, as shop steward, should have been assigning the field trips. Members had complained to Gatto that Fleurimont failed to do the field trips. When Fleurimont was not available, Guzman, as assistant shop steward, should have done the field trips. Gatto also received complaints about the way Guzman handled the field trips.

Fleurimont testified that he and Guzman had an agreement that Guzman would assign the field trips and Fleurimont would do "the other stuff." Guzman actually assigned the field trips from September to November 2002. Fleurimont did not inform the Union or Respondent Consolidated of this arrangement. Fleurimont stated that it is none of the business of the company who does the field trips.

Strippoli testified that in September 2002 the dispatchers complained to him that Fleurimont was not assigning field trips. Further, some drivers complained to Strippoli that that they were being given too many field trips. On November 4, 2002 Gatto filed a grievance on behalf of Guzman alleging the "company's refusal to allow Mr. Guzman in the office to perform his duties as Assistant Shop Steward." Apparently, the company wanted Fleurimont to make the assignments.

Fleurimont testified that on November 20, 2002 Strippoli asked him to take care of the field trips. Fleurimont, whose car windows had been smashed on November 18, told Strippoli that he was very busy with the Labor Board and that Guzman should do the field trips. Strippoli repeated that Fleurimont should do the field trips and Fleurimont responded, "I don't know what kind of B.S. guys you play with me." The breaking of Fleurimont's car windows is closely related to a portion of the controversy over field trips.

Fleurimont testified that his car was parked one block from the company yard in the Bronx when his windows were broken before 7 AM one morning. According to Fleurimont, "a

lady" told him that "two white guys" in a Jeep broke the windows.[24] Fleurimont said he filed charges with the NLRB accusing Gatto and the company of breaking his windows.[25] Fleurimont testified that he also went to the police in company with Joe Caiola from Project RISE and complained about Strippoli and Gatto. Although Fleurimont claimed that he had filed an official report with the NYC Police Department, the document he proffered, which was not admitted herein, bore no official complaint number and had none of the indicia of an officially recorded document. Fleurimont at first refused to testify whether he had any proof that the Union was involved in the damage to his car. Then Fleurimont said he had proof but did not provide it to the police because he was waiting for them to get back to him. Nor did Fleurimont relate this proof in his affidavit given to a Board agent. Fleurimont also came to a Union meeting with a hammer which he claimed had been left in his car after the window smashing incident. At this meeting he did not detail the proof allegedly in his possession that the Union was involved in the damage to his car. In fact, Fleurimont testified herein that he told Strippoli that the day he filed unfair labor practice charges against the Union for breaking his windows he "was crazy." As is evident from this synopsis of the testimony, there is no proof that the Union or the company was connected in any way with the damage to Fleurimont's car.[26]

On November 21, 2002 Gatto, Evaristo and Stankowitz were at the Brooklyn offices of the company with Guzman and Fleurimont in their capacity as shop stewards in connection with matters involving unit employees. Strippoli, Curcio, Toya and Antoci represented the company. Gatto learned that the company had decided to suspend Guzman for harassing employees in his assignment of field trips and a hearing was held on this issue. Three employees had written letters to the company accusing Guzman of favoritism and unfairness in making field trip assignments. Curcio accused Guzman of intimidating the workers. Gatto recalled that Curcio called Gatto a gangster, he did not recall that this epithet had been directed at the employees. Gatto did not recall that Curcio threatened to have the employees arrested. After Curcio left the hearing the discussion of Guzman's suspension continued. The company imposed a 5 day suspension and Gatto said the Union would grieve the discipline. This grievance was successfully arbitrated by the Union on May 14, 2003 and Guzman was reinstated with back pay.[27]

At this meeting, Guzman testified, Curcio accused him and Fleurimont of intimidating people. Curcio said they were gangsters and he told Gatto, "Clean your house." Guzman

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[24] The identity of the informant was not specified on the record.

[25] At the instant hearing, Fleurimont testified that he did not know whether the charges were pending or had been dismissed. Gatto testified that he received the charge a few days after November 19, 2002 and that it was later withdrawn.

[26] Fleurimont eventually changed his testimony to say that he had not filed a complaint against the Union with the police over the car window incident but over a later dispute with Gatto. Also, after a lengthy period of direct and cross-examination, Fleurimont detailed his reason to suspect the Union of involvement in the damage to his car. Fleurimont had been driving several women escorts home from the company garage and he had been driving them from the Zerega yard to the Longfellow yard. There was a company shuttle bus between the yards. Fleurimont recalled that before his windows were broken Gatto had asked him not to give rides to people. Fleurimont did not ask Gatto the reason for his request. Given Fleurimont's incapacity to place events in their proper time frame, I do not believe that he actually recalled when he spoke to Gatto about the rides in relation to when his windows were broken. Fleurimont's credibility is further eroded by the fact that he could not recall about which incident he purportedly filed a complaint against Gatto with the police.

[27] The award states that the suspension was for 6 ½ days.

denied harassing unit employees in connection with the field trips. Fleurimont testified that Curcio asked how long he could put up with the intimidation. Curcio pointed at Guzman and said "they wanted him to call the police to lock them up for extorting, they are scaring people and telling them if you are not part of my gang I am going to give you field trips." Again pointing his finger at Guzman, Curcio said "The group, they intimidate a lot of people in the Bronx, and I am going to call the police to lock them up for extorting." Fleurimont also remembered that Curcio told Gatto to clean his house because he had gangsters in his Union.[28]

Curcio did not recall this meeting.

After the hearing was over and all the parties were leaving the building Gatto told Strippoli that the stewards would no longer do the field trip scheduling. Gatto said that if people were complaining and stewards were disciplined for rearranging field trips then the stewards would stop doing the trips.[29] Strippoli was angry because he wanted the help of the stewards with the trips. Gatto recalled that Strippoli said Gatto should make sure the steward was there to take care of the field trips the next day and that Fleurimont should do this work. Fleurimont said he would not do it and Strippoli said, "Yes you will." Gatto testified that Fleurimont went towards Strippoli and Gatto held him back. He recalled that Fleurimont made the first move. Gatto did not hear Strippoli say he would smack Fleurimont.

Guzman testified that Strippoli began yelling that the stewards had to do the field trips and he threatened to break Fleurimont's face. Guzman recalled that Gatto held Strippoli back. At the instant hearing, Guzman was unwilling to respond to Counsel for Respondent Consolidated's question whether Fleurimont yelled at Strippoli during this confrontation.

Fleurimont testified that as the Union contingent left the hearing Strippoli was walking behind him and called out, "Yo, yo, yo, I want you to do the field trips tomorrow." Fleurimont said Strippoli was not screaming. Gatto said he did not want Fleurimont to do the field trips. Fleurimont then addressed Strippoli, saying that his name is not "yo" his name is Jona. According to Fleurimont Strippoli said, "I'm going to slap your fucking face." Fleurimont turned around to adjust a tape recorder and then turned to Strippoli and repeated several times, "Please smack my face." Fleurimont stated that he was angry and, "I was going to make him hit me in my face." Fleurimont testified both that he went toward Strippoli physically with his fist and that he did not move toward Strippoli. Fleurimont recalled that Guzman grabbed him and urged him to leave and Gatto and Evaristo grabbed Strippoli. Evaristo told Fleurimont to calm down because he still had to drive a school bus.

Strippoli recalled the confrontation differently: he said that after the hearing he told Gatto that he wanted the shop steward to do the field trips. Fleurimont came between him and Gatto "aggressively" saying, "This steward has a name." Strippoli said that he stepped back from Fleurimont and Gatto came between Strippoli and Fleurimont. Strippoli recalled that he told Fleurimont to get out of his face.

Fleurimont received a written warning from Respondent Consolidated for refusing to help in assigning field trips. The warning states that failed to follow instructions and perform his duties. The warning continued, "In the future, if you are given an assignment that you disagree

[28] I have made grammatical changes to the quoted material in this instance.

[29] Some employees had complained to Gatto that they were not treated fairly because they were not friends of Guzman. However, he did not think Guzman should be suspended for this sort of thing.

with, you must perform the work and then grieve the assignment…." Fleurimont could not recall whether he filed a grievance about this warning.

Confrontation Between Fleurimont and Gatto

On November 26, Gatto, Stankowitz and Local 854 organizer Tony Evaristo were at the Zerega yard in the Bronx. Stankowitz testified that she and Gatto had previously arranged a meeting with Fleurimont to deal with the problem of setting up field trips. As it happened, on the 26th the Union representatives had just received the NLRB charges alleging that the Union had broken the windows on Fleurimont's car. Stankowitz said the Union agents spoke loudly to Fleurimont because they were very upset that he was calling them criminals. After about 10 minutes of this discussion the Union representatives asked Fleurimont to come upstairs and try to straighten out the field trips. Fleurimont said he would not go upstairs to the office because people looked at him "funny". He said he was afraid of Strippoli. Stankowitz said that she did not see any physical contact between Gatto and Fleurimont on this occasion.

Fleurimont recalled that Gatto told him to go upstairs and do the field trips but he refused because Strippoli had threatened to smack him. Gatto countered that Fleurimont had been about to strike Strippoli. On this occasion, Fleurimont said, Gatto used foul language to him. As they all proceeded into the drivers' room, Gatto told some workers who were passing by that their shop steward was afraid to go upstairs to see Tony. Fleurimont testified that Gatto threatened to bring him up on charges if he did not go upstairs and tend to the field trips. According to Fleurimont Gatto put his chest up to him and said he did not smash his windshield and had no idea what kind of car Fleurimont drove. Fleurimont recalled that he and Gatto were yelling at each other. Although Gatto bumped his chest up to him, Fleurimont was not injured. Fleurimont maintained that he had his hands in his pocket while speaking to Gatto. Eventually, Gatto went upstairs to the office but Fleurimont did not. Fleurimont testified that he saw Gatto as the latter was leaving and Gatto wished him Happy Thanksgiving. Fleurimont returned the greeting.

Estevez testified that he saw the latter part of the argument between Fleurimont and Gatto. Both Fleurimont and Gatto were mad and were yelling at each other. Fleurimont accused Gatto of damaging his car and Gatto said, "I did not break your car but I can break other things." According to Estevez, Gatto was forcing Fleurimont to go up to the office. He said that Gatto was "pushing" Fleurimont.

Gatto testified that he was upset by the accusation that he had broken Fleurimont's car windows and he spoke bitterly to Fleurimont about this charge.[30] Gatto told Fleurimont, "You shake hands with somebody and then you 'F' them in the end." [31] Gatto told Fleurimont that he and TDU could go take a walk. He said the TDU got thrown out of power in the Union in 1986. Gatto said he was for the people and Fleurimont replied that he was not. Gatto told Fleurimont that if he had a beef with him he would not break his windows he would break something else. Gatto told Fleurimont to take a swing at him.[32] Gatto recalled that Fleurimont did not want to go upstairs to the office to do the field trips saying that he was afraid of Strippoli. Gatto asked Fleurimont what kind of labor leader he was to be afraid of Strippoli. Gatto denied that he

[30] Gatto testified that Fleurimont had accused him of breaking his car windows at the NLRB, at the police department and at Project RISE.

[31] I note that General Counsel's brief has an incorrect quotation for this phrase.

[32] Again I note that General Counsel's brief has an incorrect quotation for what Gatto admitted saying to Fleurimont.

butted up against Fleurimont during this incident.

Driver Tracy Futch was subpoenaed by Counsel for Local 854 to testify about the drivers' room incident.[33] Futch recalled that she was in the drivers' room when she heard yelling. Fleurimont was talking about his vehicle being "messed up" and Gatto said he did not know what Fleurimont was talking about. Gatto told Fleurimont to go upstairs to the office and Fleurimont refused to go up. Both men were standing in front of each other using hand gestures. Driver Randolph Young was also subpoenaed by the Union.[34] He heard arguing in the drivers' room. Fleurimont told Gatto he was not going upstairs by himself without a witness. Gatto asked whether Fleurimont was going to do the field trips and Fleurimont said he would not. Gatto said, "Let's go upstairs and look at the trips." Fleurimont accused Gatto of breaking his windows and Gatto said he knew nothing about that. Young testified that he saw no physical contact between the two men and there was no pushing or bumping. Fleurimont was gesticulating while he spoke to Gatto.

Alleged Unfair Labor Practices in Connection With Field Trips

The General Counsel asserts that on November 21, 2002 Curcio threatened to have employees arrested because of their Union activities. I credit Guzman and Fleurimont's uncontradicted testimony that Curcio called the TDU activists "gangsters" and told Gatto to "clean his house." He accused the TDU "group" of intimidation and said Guzman was guilty of extortion in the assignment in of field trips.[35] Curcio said he would call the police to have "them" locked up. Curcio's outburst clearly connected all the TDU supporters with activities he called extortion and intimidation. There is no record evidence that Curcio had any proof that Guzman or other TDU supporters had engaged in criminal activity and thus no evidence that he had any basis to have them arrested. Thus, Curcio's threat was directed only at the group's protected activities. I find that Curcio threatened to have TDU supporters arrested because of their protected concerted and Union activities in violation of Section 8 (a) (1) of the Act.

The General Counsel contends that the five day suspension imposed on Guzman at the grievance hearing of November 21, 2002 was in retaliation for his Union activities. I agree. As discussed above, Curcio's tirade against the TDU supporters and Guzman, charging them with extortion and intimidation, was directed against the Union activities of Guzman and other TDU activists. An arbitrator found that the suspension was unwarranted. There is no competent record evidence before me that Guzman had engaged in any misconduct. I find that Respondent Consolidated suspended Guzman on November 21, 2002 in violation of Section 8 (a) (3) and (1) of the Act.

The General Counsel asserts that on November 21, 2002 Strippoli threatened to assault Fleurimont because of his Union activities. Each witness gave a different version of this encounter. As is evident from my credibility findings herein, I have found that Strippoli, Guzman and Fleurimont inaccurately shaded their testimony at various points in the instant proceeding. I have not found that Gatto gave inaccurate testimony, although Gatto freely admitted that he did not recall everything he was asked about. Thus, I shall rely principally on Gatto's recollection of

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[33] Futch was an escort for 4 years and then worked as a driver for 8 years. Futch was a cooperative witness who answered each question fully and I shall credit her testimony.

[34] Young has been driver for 14 years. He had an impressive demeanor and I shall credit his testimony.

[35] As noted above, Guzman's acts in connection with the assignment of field trips were the subject of an arbitration hearing which exonerated Guzman of any wrongdoing.

the altercation between Strippoli and Fleurimont on November 21. It is clear that the argument began when Strippoli insisted that Fleurimont should assign the field trips the next day and Fleurimont took umbrage at Strippoli's manner. Gatto, whom I credit, testified that Fleurimont made the first move toward Strippoli and had to be restrained. I find incredible Fleurimont's testimony that right after Strippoli threatened to smack his face he turned around to adjust a tape recorder. I cannot believe that if Fleurimont had been threatened with physical violence he would turn his back on his attacker in order to press a button. Moreover, Fleurimont admitted that he was angry and that he taunted Strippoli in an effort to make Strippoli hit him. Fleurimont also admitted that he went toward Strippoli physically with his fist. Taken together, these are not the actions of someone who is being threatened with violence: these are the actions of someone who is trying to provoke violence. In these circumstances, I credit Strippoli that he told Fleurimont to "get out of his face." Further, it does not make sense that Strippoli, who actually wanted Fleurimont to begin doing the field trips, would threaten to smack Fleurimont as an incentive. Thus, I do not find that Strippoli threatened to assault Fleurimont.

The General Counsel alleges that on November 26, 2002 the Union violated Section 8 (b) (1) (A) of the Act when Gatto harassed and insulted Fleurimont, threatened to assault him, physically assaulted him and threatened to have him disciplined for failing to assign field trips.

A reading of Fleurimont's testimony about this incident shows that Fleurimont omitted any mention that during the confrontation with Gatto he continued to accuse Gatto of damaging his car. All the other witnesses testified that Fleurimont repeated his accusations against Gatto on this occasion. I have found that Fleurimont is not a credible witness and his retelling of this incident reinforces my belief that Fleurimont would only testify to things that put him in a favorable light. As Fleurimont testified at length about this event I formed the strong impression that he was embellishing as he went along and adding comments that he wished he or others had made at the time. I find that Fleurimont tailored his testimony to the charges without regard to whether he was recalling accurately. I will not credit Fleurimont's version of this incident. Fleurimont testified that Gatto bumped his chest up to him but did not injure him. Fleurimont did not testify that Gatto pushed him, although Estevez used the word "push." Gatto denied that he butted up against Fleurimont. Stankowitz also said that Gatto did not push nor bump Fleurimont. Futch and Young did not see any physical contact between Gatto and Fleurimont. I do not credit Estevez that Gatto was pushing Fleurimont. Rather I credit Gatto that he did not have any physical contact with Fleurimont. I do not credit Fleurimont that Gatto threatened to bring him up on charges if he did not go upstairs to handle the field trips. Gatto denied this. Moreover, this allegation is nonsensical. Just a few days before, on November 21, Gatto had informed management that if the company persisted in disciplining stewards for their activities in connection with field trips then the stewards would stop assigning the trips. Gatto knew full well that it was improper to discipline the steward for failure to do the field trips.

I find that the evidence shows that Gatto was upset and angry that Fleurimont had accused him and the Union of breaking the car windows. The testimony establishes that during this confrontation Fleurimont was again accusing Gatto of damaging his car. Gatto denied knowing anything about the windows. Gatto admittedly told Fleurimont that if he had a beef with him he would not break his windows he would break something else. Gatto told Fleurimont to take a swing at him. Both men were yelling and both were gesticulating. Then the subject switched to the field trip assignments. Gatto wanted Fleurimont to accompany him to the company office to make the assignments and Fleurimont refused to go saying that he was afraid of Strippoli. Gatto ridiculed Fleurimont for this fear but Gatto did not threaten to bring Fleurimont up on charges.

I do not find that Gatto threatened to assault Fleurimont. Gatto was understandably

angry that Fleurimont was blaming him for the damage to his car windows. Any reasonable person would be incensed that such official charges had been made without any evidence to support them. And Fleurimont repeated the charge when he saw Gatto on November 26. Gatto's response was that "if" he had a beef with Fleurimont he would have broken something else. This was said in response to Fleurimont's provocative accusation. Fleurimont was the Union shop steward and had constant contact with Gatto. By November 2002 the Union had represented Fleurimont in the grievance relating to his September 30 suspension, obtaining a full make whole remedy and an apology for him. Gatto and the Union had informed the company that the shop stewards would no longer do field trips if the company disciplined them for their actions. Gatto, in the face of advice of counsel that the case had no merit, had pursued the UCP grievance at the insistence of Fleurimont and others. Gatto could well be highly indignant that after this strong and steadfast representation on the part of Local 854 Fleurimont would suddenly accuse him of a violent crime. Gatto did not say that he would assault Fleurimont. In the circumstances of this heated discussion and Fleurimont's provocative accusation I do not find that Gatto's "if" amounted to a threat to assault Fleurimont.

The General Counsel's Brief also urges that Respondent Consolidated "beginning in and around August or September 2002, required Jona Fleurimont and Jose Guzman to implement its assignments of field trips in retaliation for their union and protected concerted activities in violation of Section 8 (a) (1) and (3) of the Act." General Counsel's Brief does not otherwise discuss this allegation. I do not find any support in the record for this allegation and I shall dismiss it.

G. Vandalism at the Zerega Yard and Holiday Greetings

On December 17, 2002 the Zerega yard was vandalized. Strippoli described the damage as resulting from someone playing demolition derby with the buses parked in the yard. From 30 to 40 buses were damaged to the cost of about $100,000, and the buses could not be used to transport children. Spare buses had to be driven over from Brooklyn.

Respondent Consolidated distributed a letter in English, French and Spanish to employees dated December 19, 2002 which expressed dismay at the destruction in the yard. The letter stated, in part

> … The company does not feel that violence will accomplish anything. The company feels that this violent, malicious act was in retaliation for damage that was done to one of our fellow employees' personal car. This could be no further from the truth. The person's car that was damaged has a history of intimidating fellow employees, forcing them to do work that was not intended for them and to join his group. (This damage may have been of a personal nature.) …
>
> As a result of this vandalism, the company is contemplating closing down the satellite yard in the Bronx and moving it to Brooklyn where we feel it will be more secure. This would cause a tremendous hardship to most of the hardworking employees (escorts and drivers) who have children that must be tended to during the day. Why must the majority of employees suffer for the few disgruntled ones.
>
> … The board of Ed, the company, the union and the police department will diligently investigate this incident. … We would like you to take time during this Christmas vacation to rethink your position on all these issues. Hopefully, the silent majority will overrule the loud, violent and selfish minority and take a stand to protect their job and their future. ….

Rodriguez, Figueroa and Lopez distributed a TDU prepared flier in response to the company holiday letter. The flier extolled the new shop stewards who would defend worker rights "without seeking personal benefit." The flier stated that under the Local 854 contract the employees were second class citizens as contrasted with employees under Local 1181 and Local 100 contracts. The flier stated that the company had answered employee grievances with retaliation, intimidation and violence.

Local 854 distributed a holiday letter dated December 19, 2002 and signed by Gatto. The letter mentioned a new scholarship program and urged Union members to attend meetings and contact the Union to solve their problems. The letter also stated: "A few of our members have decided to attack our Local Union in what appears to be an effort to destroy what we have built over the past few years. This group has stooped to making false statements about our Local Union and me personally. … All they really do is play into the employer's hand by creating the appearance of a disorganized union….."

Guzman testified that he filed a complaint and gave copies of the company and the Union letter to Project RISE. Guzman distributed a flier that attacked both the company's suggestion that it might move the buses to Brooklyn and described Local 854's purported hostility to the new shop stewards.[36]

The General Counsel contends that Respondent Consolidated's letter of December 19 threatened to close the Bronx facility in retaliation for employees' Union activities. The General Counsel's Brief states that the company letter accuses TDU supporters of damaging the buses in retaliation for the damage to Fleurimont's car. The Brief concludes that the threat to move the buses is coercive. I find that a fair reading of the December 19 letter is that the company is disclaiming any responsibility for the damage to Fleurimont's car while pointing out that Fleurimont may have "personal" adversaries as a result of making assignments of field trips to non TDU supporters. The letter speculates that the buses may have been vandalized out of a misplaced belief that the company had damaged Fleurimont's car. The letter attributes the bus vandalism to a few disgruntled employees and it states that there is an ongoing investigation to identify the vandals. The letter says that the vandalism may bring a move to Brooklyn and urges the silent majority to overrule the violent minority to protect their jobs. I read this letter as a threat that if any more vandalism occurs the Bronx yards may be closed. It is evident that moving the buses to Brooklyn would impose a hardship not only on the employees but also on the company which would have to bear the added costs in time and fuel of driving buses from Brooklyn to their Bronx and Manhattan routes every day. It is not in the company's economic interest to close the Bronx yards. Thus, the letter is a plea for an end to violence. I can find no nexus between the threat to move the buses to Brooklyn and a threat to the lawful Union activities of the TDU supporters. The letter does not threaten to close the Bronx yards because employees support TDU: the letter threatens to close the yard if there is more vandalism. I do not find that the letter of December 19, 2002 unlawfully threatens to close the Bronx yards.

H. The Fall 2003 Pick

Strippoli testified that in 2003 Consolidated acquired new routes to perform pupil transportation services. The employees who drove those routes were represented by Local 1181. Consolidated had to cover the routes beginning September 2003 and more drivers were

[36] This flier was prepared by the TDU as were the other fliers and petitions handed out by the activist unit members.

to be hired for those routes. Strippoli informed Gatto that the jobs were available so that the unit members could obtain the work before the company began hiring from the street. Strippoli attended the August 27, 2003 pick for the school year beginning September 8, 2003. Strippoli recalled that Gatto was asking the members as they came in whether they would like to transfer. The drivers would be able to move to the 1181 shop in order of seniority. Shop stewards had super-seniority in deciding whether to move to the 1881 routes. Strippoli testified that he may have mentioned to Guzman, who was then the shop steward, that the 1181 routes were available but he did not try to convince Guzman to take the work. He did not recall asking other employees whether they wanted the 1181 routes.

Gatto recalled the fall 2003 pick took place at the company's Sheffield location in Brooklyn. This was an all-day affair. Gatto remembered that he informed Guzman that there were job openings in a company operating under the Consolidated name whose drivers were represented by Local 1181. These jobs would be offered to Respondent's unit members by seniority. Gatto testified that he told Guzman of the opening but that he did not try to convince Guzman to take the job nor did he offer any jobs to Guzman and his supporters. Gatto recalled that on this occasion Guzman had mentioned that he was thinking of working for another company. In response to a leading question, Gatto said it was possible that he drove Guzman to Curcio's office to speak to Curcio about the 1181 routes. If he did drive Guzman, Gatto said, it was because Guzman asked to speak to Curcio. Gatto stated that at the September 2, 2003 Local 854 membership meeting, Guzman informed him that he would not take a Local 1181 job.

Fleurimont also testified that Gatto informed him that there were job openings at a unit represented by Local 1181. Fleurimont placed this incident at the summer pick in 2002. I do not credit Fleurimont, who had a bad recall of dates and whose testimony on this issue, as on many others, was unresponsive and diffuse. By August 2003 Fleurimont was no longer working for Respondent Consolidated.

I. Closer Supervision and Discipline

Following and Videotaping Drivers on Their Routes

Estevez testified that he was aware of being followed by company vehicles on three separate occasions in the school year of 2002-2003 while he was driving his route. On one occasion, company safety director Joe Antoci and "Bill" followed him onto the Cross Bronx Expressway and watched him pick up children at their homes.[37] After Estevez discharged the children at school, Antoci asked to see his license and ID. Then Antoci told Estevez that the radio he had placed in his bus could fall on his head and hit him. Estevez took the radio down. The following week Antoci and Bill waited for Estevez at his first stop and followed him on his rounds while they videotaped him. After a while, Antoci came up to Estevez and the latter took down his radio and put it on the seat. Antoci told Estevez that he had done well and that they would use the video to show other drivers how to do things. At the end of the school year Bronx safety director Vito Mecca followed Estevez for a few stops on his route. When Estevez asked Mecca about this the next day, Mecca said he was ordered to follow Estevez. Respondent Consolidated did not call Antoci, Mecca or Bill to testify herein. Estevez, who has been employed by Respondent since 1993, has received no discipline from his employer and he continues to work at the company. Estevez testified that company policy forbids having radios in school buses but that most drivers do indeed have radios.

[37] It is probable that Bill is Bronx safety officer Bill Ronecker.

Rodriguez testified that in February 2003 Mecca and "Betty" followed him in a white vehicle while he was driving his bus route. While Rodriguez was parked in front of the school, Mecca and Betty asked to see his ID and asked to see his fire extinguisher. Later that day Mecca showed Rodriguez a tape he had made while following his bus. The tape showed that the right wheel of Rodriguez' bus went over the line marking a safety zone on the roadway. Mecca said if not for this problem it would not have been a serious matter. Rodriguez testified that Mecca told him, "[I]f it wouldn't have been for him, this wouldn't have been a serious matter. But he had orders from the top to penalize me." Mecca gave Rodriguez a written warning. The warning of February 14, 2003 states that Rodriguez had gone over a safety zone with children aboard the bus. In the space dedicated to the employee's remarks, Rodriguez checked the box stating "I agree with the employers statement" (sic) and he wrote, "I didn't know the safety zone was there." Rodriguez signed the warning form and he did not grieve the warning. Rodriguez recalled that he had received a warning on June 30, 2002 for an accident with his school bus. He had not grieved this discipline.

Fleurimont testified that in June 2002 while he was driving his route he saw Joe Antoci and Bill following him. This happened again when Antoci and Mecca followed him. Antoci came to Fleurimont's bus at the end of the route and asked to see his license. He pointed out that Fleurimont's fire extinguisher lacked a nozzle. Fleurimont said he had never been followed before.

On June 5 Fleurimont was called to a hearing in Brooklyn and given three warnings; the warnings were all dated "6-5-02." One warning stated that on May 13 Fleurimont did not follow procedures during a breakdown. "He was told to call office after making last drop off. Also insubordinate to dispatchers." Fleurimont signed his agreement to this warning. Another warning stated that on June 3 Fleurimont had not pre-tripped his bus and had left the yard without a fire extinguisher, with his back up lights and buzzer not working and with his lower right brake light out. Further, Fleurimont was speeding. The warning stated that the driver must do a pre-trip every day, have the safety equipment and "drive within speed limit." Fleurimont signed his agreement but he wrote on the form "brake lights are correctly working." The third warning stated that on June 5 Fleurimont did not have a nozzle on his fire extinguisher and that he "must check safety equipment AM and PM everyday." Fleurimont signed the warning and indicated on the document that he was in agreement with the warning.

Fleurimont testified that those present at the hearing on these three warnings were Gatto, Stankowitz and Nigro for Local 854, and Curcio, Antoci and Bill for Consolidated. Curcio had walked into the meeting and asked Fleurimont who he was. Fleurimont replied that his name was Jona and he asked whether Curcio had heard about him as a bad guy. According to Fleurimont, Curcio said that 10 drivers had called him and said Fleurimont was talking bad about the Union and the company. Curcio screamed and asked Fleurimont who the hell he was, saying that Fleurimont could not control the charters. Curcio said another company had been sold because of charters and that Fleurimont could not make him close his doors after 30 years of running his business. Curcio said that Fleurimont was earning $800 and asked what more he wanted. Curcio called Fleurimont a dumb bus driver and troublemaker. Gatto told Curcio that he had to let Fleurimont speak, but Curcio replied that he couldn't stay with Fleurimont and he walked out of the room.

Fleurimont acknowledged that after Gatto said that Fleurimont should speak, he did indeed speak. Fleurimont did not ask Gatto whether he should sign the warnings nor did he tell Gatto that he did not want to sign. Fleurimont stated at the instant hearing that he signed the warnings because he was "crazy." At the instant hearing Fleurimont disputed the accuracy of the warnings. He said he had left the yard without his fire extinguisher, but he did not speed

and the lights and buzzer were working. Fleurimont denied that he was insubordinate to the dispatcher, maintaining that he had never been told to call the dispatcher after making his last drop off. Fleurimont admitted that he had yelled at the dispatcher because the dispatcher said he had not followed instructions. Fleurimont did not file any grievance about these warnings.

Helen Best has been an escort for Respondent Consolidated since the year 2000. Best was the escort on Fleurimont's bus from September 2002 until January 2003. Best testified that she and Fleurimont got along pretty well when first assigned to work together. Fleurimont had won the election for shop steward and he confided in Best that as shop steward he did not believe he should have to drive a bus and he thought he should be given an office.

Best testified that beginning in September and October 2002 she was on the bus when parents complained to Fleurimont that he was so late arriving at their homes in the morning that they had already made other arrangements to take the children to school. In addition, the principals of both schools on Fleurimont's route complained to him that his bus was late. Best testified that it was usual for the company's safety officers and street supervisors to follow the buses to make sure the flashers were on and to check on complaints. This testimony is unrefuted. On those occasions when Fleurimont was followed he did not like it and he got upset. Fleurimont would argue with the officers who were following him. Fleurimont told Best that he was slamming on the brakes deliberately to see if he could cause the company car following him to run into the back of the bus.[38] Best recalled that in addition to slamming on the brakes and arguing with the safety officer Fleurimont would pull over the bus and stop so that he could speak on the telephone. Fleurimont was taking longer to drive his route and driving slowly on purpose. Best testified that this behavior continued through January 2003. Eventually, the Department of Education, Office of Pupil Transportation, gave the company a violation because of complaints from parents and school principals. The company dispatcher showed the violation to Fleurimont and Best and then questioned them about it. This is the normal procedure, according to Best's unrefuted testimony. Best concluded that Fleurimont's bus was followed because of the various complaints about him. Best testified that she was on the bus with Fleurimont on the day he had the accident for which he was ultimately fired.[39] A week before Fleurimont's last day Best went to the company's main office in Brooklyn and said she did not want to work with him any more. Best was then assigned to a different driver.

Fleurimont testified that the company followed him with a video camera beginning on January 13, 2003. Fleurimont stated that he sent a letter to Local 854 about this. The letter is not in the record.

After Fleurimont was fired he came to Best's home unannounced on three occasions. The first two times Best refused to let him in. The third time as Best was approaching her door Fleurimont ran up to her and asked her what Curcio had said when she was called into the office. Best told Fleurimont that she had not been called but that she had gone to the office on her own. Best, who had heard rumors that Fleurimont was accusing her of being the cause of his discharge, asked Fleurimont about the rumors that she had "ratted on" him and caused his

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[38] Best did not complain to management about this dangerous behavior because if an escort complains about the driver he can make life very difficult for the escort. An escort will not complain about the driver unless absolutely necessary.

[39] Fleurimont was discharged on January 27, 2003. Local 854 processed a grievance on his behalf and the arbitrator ordered Fleurimont's reinstatement with back pay. The Union successfully enforced the award in the New York State Supreme Court.

termination.[40] Fleurimont did not deny these rumors. Best said she did not want to speak to him and Fleurimont walked away. After this encounter, Best testified, she went to the police and filed a complaint about Fleurimont. Best said she was upset that he had come to her house three times.

Best testified that she spoke to Union representative Evaristo and Project RISE investigator Caiola who called to ask her about Fleurimont's complaints that he was being harassed by the company. Best told Caiola why the bus had been followed and she said this was not harassment. Best told Caiola that ever since Fleurimont had become shop steward he was acting weird and crazy and he "was never wrong."

Fleurimont acknowledged that Best testified truthfully about his slamming on the brakes but he denied that this caused Best to bang her head.

Discussion of Alleged Unfair Labor Practices

The General Counsel asserts that Respondent Consolidated subjected employees to closer supervision by following and videotaping them while on their routes in violation of Section 8 (a) (1) and (3) of the Act.

Although Respondent Consolidated did not provide any testimony from company officials about the practice of following drivers on their routes, there is some evidence about this practice in the record. Thus, escort Helen Best testified that the company followed drivers to be sure they were maintaining proper procedures and to check on complaints. However, Respondent Consolidated did not present any evidence as to how it chose which drivers to follow, how often drivers were followed, and whether the practice of following fell equally on those who engaged in Union activities and those who did not.

Estevez was active in the shop steward campaign in the spring of 2002 and, as discussed above, he was questioned by Strippoli about these activities in a conversation that included threats of arrest for those participating in the circulation of the petition. Thus, the company was aware of Estevez' Union activities and the company opposed those activities. Strippoli had expressed his vehement displeasure to Estevez during the shop steward campaign. During the conversation with Strippoli Estevez asked why he was being followed and Strippoli replied that it was customary and the company could follow anyone. Respondent Consolidated did not call any witnesses to explain why Estevez was being followed. Estevez' testimony that Mecca said he was ordered to follow him at the end of the school year in 2003 is unrebutted. The record shows that Estevez has a clean disciplinary record.[41] It is noteworthy that the second time Estevez was followed a videotape was made and Antoci told him that he had done well and the tape would be used to educate other drivers. Thus, the company followed an excellent driver with a spotless record three times in one school year. In the absence of any evidence to the contrary I find that Estevez was followed because of his protected concerted and Union activities. Respondent subjected Estevez to closer supervision in violation of Section 8 (a) (3) and (1) of the Act. *International Paper*, 313 NLRB 280, 286 (1993).

[40] Best had heard from several employees that she should "watch her back." She was fearful because she left home very early in the morning.

[41] Contrary to General Counsel's Brief, Estevez did not testify that he had never been followed before.

Fleurimont testified that he had never been followed before June 2002 when he was followed twice as he was driving his route. The warnings issued to Fleurimont show that these occasions were on June 3 and 5, 2002 during the height of the shop steward election process. Fleurimont was the candidate running against the incumbent. The record amply demonstrates Respondent Consolidated's hostility to those who were petitioning for a shop steward election. Further, at a hearing on the warnings Curcio screamed at Fleurimont, asking him who the hell he was, berating him for threatening his business and asking Fleurimont what more he could want since he earned $800 per week. Respondent Consolidated offered no explanation for following Fleurimont twice in one week. I find that Respondent subjected Fleurimont to closer supervision in June 2002 because he engaged in protected concerted and Union activities and that Respondent violated Section 8 (a) (3) and (1) of the Act.

The General Counsel contends that Curcio made a threat of unspecified retaliation against Fleurimont and verbally abused Fleurimont in violation of Section 8 (a) (1) of the Act. Curcio's statement, delivered in a screaming voice, that Fleurimont was a troublemaker, that he was earning $800 and that Fleurimont could not put Curcio out of business implied that Curcio viewed Fleurimont's Union activities as a threat to the company's existence. Curcio's statement that he would not permit Fleurimont to shut down his business implied that Curcio would take some retaliatory action against Fleurimont for his activities in the shop steward election and his demands that Local 854 unit members receive the higher compensation provided to Local 1181 members. Fleurimont's activities were protected. Curcio's comments were an implied threat of unspecified retaliation against Fleurimont and thus violated Section 8 (a) (1) of the Act. *Harpercollins San Francisco v. NLRB,* 79 F. 3rd 1324, 1330 (2d Cir. 1996).

The General Counsel alleges that the three written warnings issued to Fleurimont dated June 5, 2002 for events occurring on May 13, June 3 and June 5 were given as a result of his Union activities. The General Counsel states that the warnings were given at the height of the shop steward campaign for "petty" violations that were never substantiated and Fleurimont had never been disciplined before June 5. The record shows that the first shop steward election petition was delivered to the Union on May 20. The meeting with Gatto in the Zerega yard attended by 60 or 70 drivers took place after May 20. The coercive interrogation of Estevez by Strippoli took place around May 17. Further, as found above, Respondent Consolidated had unlawfully followed Fleurimont on his route on June 3 and June 5 and Curcio made unlawful threatening comments to Fleurimont at the hearing on the three written warnings. The company's animus to the employees' activities in connection with the shop steward election is well established. I find that a motivation for issuing the three warnings to Fleurimont on June 5, 2002 was his Union activity. Respondent offered no testimony or evidence to show that it would have issued the warnings to Fleurimont even if he had not been active in Union affairs. Thus, Respondent violated Section 8 (a) (3) and (1) by issuing three written warnings to Fleurimont on June 5, 2002.

The General Counsel further alleges that Respondent Consolidated unlawfully subjected Rodriguez and Fleurimont to closer supervision by following and videotaping them in January and February 2003. The General Counsel alleges that the warning issued to Rodriguez after he was followed was unlawful.

Rodriguez was followed while he drove his route in early February 2003 and a videotape made on this occasion was shown to him. The tape showed that he had gone over a safety zone marker. I note that Rodriguez did not dispute his driving error and did not grieve the warning he received. However, the uncontradicted testimony shows that safety office Mecca told Rodriguez that if it had been up to him he would not have considered this a serious infraction but, Mecca said, he had orders from the top to penalize Rodriguez. Respondent

Consolidated did not present any testimony to explain why Rodriguez was followed and videotaped at this time. Rodriguez' accident and warning on June 30, 2002 were too distant in time to provide a connection with following him in February 2003. Further, Rodriguez testified without contradiction that he had never been followed before. Rodriguez had been active in soliciting funds for Fleurimont after his discharge and in circulating a petition protesting the discharge. This activity occurred shortly before Rodriguez was followed and videotaped on his route. Rodriguez was an early supporter of TDU and had been active in distributing flyers, encouraging employees to sign the petition for the shop steward election and engaging in other concerted activities at the yard. Rodriguez was one of a core group of TDU activists at the company. Although company officials had never expressed their displeasure to Rodriguez directly, the record amply discloses Respondent Consolidated's disapproval of its employees' concerted activities in connection with TDU and the shop steward election. I find that Respondent Consolidated subjected Rodriguez to closer supervision because he engaged in Union and concerted activities and that Respondent thus violated Section 8 (a) (3) and (1) of the Act.

The General Counsel asserts that the warning would not have been issued but for Rodriguez' concerted and Union activities. The uncontradicted testimony shows that Mecca admitted to Rodriguez that he did not consider going over the safety zone line a serious matter but that Mecca had orders "from the top" to issue the warning to Rodriguez. Thus, Respondent admitted to Rodriguez that he was being disciplined for something not considered serious because orders from the top had mandated this action. I find that these orders would not have been given but for Rodriguez' open and continued participation in Union and concerted activities. Thus I find that Respondent Consolidated violated Section 8 (a) (1) and (3) of the Act by issuing a written warning to Rodriguez on February 14, 2003.

The General Counsel's Brief argues that Respondent Consolidated followed and videotaped Fleurimont in January 2003 in retaliation for his activities in presenting and supporting the TDU proposed amendments to the Local 854 by-laws. Although the record shows that the company knew of and opposed the shop steward election activities of the TDU supporters there is no evidence in the record to show that Respondent Consolidated knew of and was concerned about the by-law proposals. The by-law proposals were not the subject of visible activity in the yards. Moreover, the testimony of Fleurimont's escort Helen Best shows that in the fall of 2002 parents and school principals began complaining that Fleurimont was late picking up the children. Fleurimont was deliberately taking too long to drive his route. Eventually the Department of Education gave the company a violation which was shown to Fleurimont and Best. Best testified that the school bus was followed due to the multiple complaints and the violation. When Fleurimont noticed that he was being followed he became upset and he slammed on his brakes in an effort to cause the company vehicle behind him to hit the rear of the bus. Fleurimont acknowledged this behavior. Best testified that Fleurimont's delaying tactics while driving his route went on from the fall of 2002 until Best asked to be taken off Fleurimont's bus shortly before he was fired in January 2003. Given Fleurimont's undenied behavior of causing his bus to be late over a period of several months and of stopping short whenever he was followed it is not surprising that the company continued to follow Fleurimont for weeks at a time. Indeed, the Respondent Consolidated had a responsibility to see that children were transported safely and got to school on time. The company would have been remiss if it did not try to deal with the complaints and the violation that it had received. Of course, the record shows that Respondent Consolidated harbored animus to Fleurimont as a result of his Union and concerted activities. However, I find that even in the absence of Fleurimont's Union activities the employer would have followed him and subjected him to closer supervision because of the parents' and principals' complaints and the official violation from the Department of Education. Thus, I do not find that following Fleurimont in January 2003

constituted a violation of the Act. *Wright Line*, 251 NLRB 1083 (1980).

J. 19 A Road Tests

Background

Companies employing school bus drivers in New York State must administer a "19A road test" when the employee is first hired. Further, even after a bus driver has qualified to drive a school bus under the applicable sections of New York State law, the employer must administer a 19A test every two years. However, the employer is free to administer the 19A test more frequently. The 19A test consists of two parts: in the first part the driver must perform a thorough pre-trip inspection of the inside and outside elements of the bus and in the second part the driver must take a road test on the City streets. Each mistake made by the driver counts for a certain number of points and some mistakes call for automatic disqualification. A driver who accumulates 30 points fails even without an item constituting automatic disqualification.

The uncontradicted record evidence shows that if a driver fails a 19A road test he may not drive a school bus for at least five days. In that time period he may obtain additional training and then he may schedule a second test. The second 19A test is administered by a different individual. If the driver then fails the second test he may not drive a school bus and he must be retested by the State Department of Motor Vehicles.

Maria Toya, who was Respondent Consolidated's human resources manager from 2000 to 2004, testified that a child was run over and killed by one of Respondent's buses in February 2003.[42] After this fatal accident Toya attended a meeting at which management discussed safety issues. Later, Curcio informed Toya about the implementation of a new policy which provided that henceforth any driver who had an accident would have to pass a 19A test whether or not he or she had been tested within the last two years. In addition, all those who had experienced an accident in the year preceding February 2003 would be given a 19A test.

The road tests for Respondent Consolidated's employees are administered by a number of New York State licensed individuals, two of whom testified herein: Robert Verderosa and Joseph Van Aken. Verderosa is a school bus driver for a company named Amboy Atlantic Express where he is a member of Local 1181, ATU. In addition, Verderosa runs a company that performs driver training and driver testing. Verderosa testified that he administers 19A tests for Respondent and that these comprise 3% of his entire business. He estimated that during the school year he averaged two occasions per month of testing for Respondent in the Bronx. Verderosa has performed this testing for Respondent since 1998. Verderosa conducts 19A testing for six other school bus companies, both union and non-union. Verderosa also conducts the State required classroom instruction for school bus drivers at various bus companies, including Respondent. Joseph Van Aken is employed by Empire Training centers as a 19A examiner and school bus driving instructor.[43] He has performed 19A testing for Respondent for about four years. Van Aken stated that he administers 90% to 95% of the 19A tests given to Respondent's employees in Brooklyn and he does most of the training in Brooklyn for Respondent's employees. Van Aken is employed as a school bus driver by a company called

[42] Toya's responsibilities included the administration of benefits, keeping personnel files, attending grievance and termination meetings and doing the paper work for all hiring and firing. Toya administered leaves of absence and medical leaves. At the time she gave her testimony herein, Toya had left Respondent Consolidated and was employed in a different industry.

[43] Van Aken does not have an ownership interest in Empire.

Twenty-first Avenue Transportation and he is a member of Local 426.

The testimony of Verderosa and Van Aken, whom I credit, establishes that when 19A tests are to be administered to Respondent's employees, Consolidated safety officer Joe Antoci telephones Verderosa and Van Aken and tells them to appear and conduct road tests at Respondent's facility. Verderosa testified that Antoci sends him a fax with a list of employee names before the test is administered. Van Aken testified that he only learns the identities of the employees to be tested when they present themselves for the test. Verderosa stated that he gives a blank test form to each employee and asks that the employee fill in the name, birth date, social security number, date of test, driver's license number and signature. Verderosa stated that employees always fill out the date the test is given. Van Aken said that he fills in all the information but that the driver signs the form after the test is completed and after Van Aken has gone over the elements of the test in detail and informed the driver of his score. Both Verderosa and Van Aken fill in the parts of the form that call for points to be deducted when a fault is committed. After the tests are conducted and the forms completed, Verderosa gives his forms to Doherty in the Bronx and Van Aken gives his forms to Antoci in Brooklyn.

Other 19A examiners used by Respondent Consolidated did not testify herein. Bob Russo, is an employee of Safety First, who tests drivers in Brooklyn. Vito Mecca is Respondent Consolidated's safety officer in the Bronx. He administers road tests to new employees and he conducts 19A testing on occasion. Bill Ronecker is another Bronx safety officer employed by the company who tests new employees and conducts 19A testing on occasion.

Both Verderosa and Van Aken testified in detail about the elements of the pre-trip inspection and the manner in which they conduct the 19A tests. I will not detail the elements of the pre-trip inspection.

Certain of the General Counsel's witnesses began their descriptions of the tests they had taken by saying that they never were required to perform the basic elements of the test. For the reasons that appear below I have not relied on this testimony. Further, certain of General Counsel's witnesses also insisted that they had been told to put incorrect dates on their tests. I do not credit this testimony, as will be shown below.

Estevez testified that since he was first employed in 1993 he has been given a 19A test every two years. Estevez passed all of his tests. Estevez maintained that he had "never" been required to perform the pre-trip inspection and "never" drove the bus as part of the 19A test. He testified that although he passed in 2002 he did not perform the inspection and he did not even drive the bus. Estevez' 2002 test form is signed by Certified Examiner Vito Mecca. The test form shows that Estevez accumulated a total of 20 points for failing to "check horn, heater, defroster," failing to "use caution in departing" and failing to "use transmission properly en route." On cross-examination Estevez testified that his last 19A test was given in January 2004 and that all the drivers present actually performed the road test. Estevez was clearly primed to testify categorically to facts that would support the General Counsel's view of the case, but on cross-examination Estevez changed his testimony. I conclude that Estevez' testimony on this matter was not accurate and that his willingness to shade his testimony makes him an unreliable witness concerning the 19A tests.

Angel Garces, who was the Local 854 shop steward when he testified herein, stated that he has been a driver for the company for 9 or 10 years. Garces stated that since his employment began he has taken 19A tests four or five times, all of them in Brooklyn. Garces said that every two years he would meet the instructor, the instructor would give the drivers present an incorrect date to put on the test form, and then all the drivers would leave. Garces

said he never drove the bus for a 19A exam.[44] The record shows that on June 7, 2004 and October 17, 2002, Garces was given a 19A test by Verderosa, who works exclusively in the Bronx. On October 25, 2000 the examiner for Garces' 19A test was Raul Palacios about whom there is no other information. Garces was thus incorrect about taking all of his tests in Brooklyn. I do not credit Garces on this issue.

Fleurimont testified that from the time he began work until he was discharged he "never" took a 19A road test. However, a test sheet for Fleurimont is in evidence. On further examination Fleurimont stated that he filled out the paperwork including the wrong date given to him by the examiner for this test. The document is dated 8-8-01 and it shows that the test was administered by Verderosa. Fleurimont received a passing grade of 10 points and Verderosa wrote a comment "drives well." Fleurimont maintained that he was working in Brooklyn at the time while Verderosa works only in the Bronx. Fleurimont cited this as proof that he did not take the test in August 2001. The instant record shows that drivers may be sent to other locations to take 19A exams. I do not credit Fleurimont. While at first saying he was never given a test he changed his testimony when confronted with the record evidence but maintained that it bore the wrong date. This is yet another example of Fleurimont's penchant for saying whatever he wanted during his testimony and then making adjustments as the questioning progressed. As I have already stated, Fleurimont demonstrated an inability to recall dates accurately and I have found that he is not a reliable witness for other reasons discussed above. I do not credit Fleurimont on this issue.

Guzman testified that in April 2003 he took a 19A test with Verderosa. Guzman did the pre-trip inspection and he performed a comprehensive road test including various driving maneuvers. Guzman could not recall the name of the examiner for his 2001 road test; he testified that he drove the bus but that none of the drivers on the bus performed an inspection. I have found herein that Guzman is not a reliable witness and I do not credit him on this issue. Guzman was not able to recall the identity of the examiner yet he professed to be able to recall that he drove the bus but that no driver performed a pre-trip inspection. I find this selective memory of events occurring years ago quite unpersuasive.

Two witnesses subpoenaed by Local 854 to testify about other matters were also asked about their 19A exams. Tracy Futch, a driver for 9 years, testified that she took 19A exams regularly and she testified from personal experience that the frequency of exams was increased if the driver were involved in an accident.[45] Futch said that she was always required to pre-trip the bus and perform the actual road test during the exam. Randolph Young, a driver for 14 years, testified that he was always required to go out and drive for his 19A exam and that he

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[44] On cross-examination Garces denied that he had spoken to either Counsel for the General Counsel, who called him to the stand, or Counsel for the TDU prior to giving his testimony. Manifestly, Garces was attempting to hide the fact that someone had (necessarily, of course), prepared him to testify herein. Garces testified on July 20, 2004, and he had served as shop steward since February 2003, but he professed not to recall how many years he had served as shop steward. However, Garces recalled precisely that he had an accident with his school bus on January 27, 2003. As I listened to Garces testify I formed the impression that Garces would answer only those questions that met his point of view and that he resisted answering all other questions. I formed the impression that Garces did not understand the requirement to answer fully and truthfully while under oath. I believe that Garces would shade his testimony to favor his view of the proceedings. I find that Garces is not a reliable witness.

[45] The record shows that Futch was tested in June 2002 and in May 2003, both times by Verderosa.

always performed the pre-trip inspection.[46] Neither Futch nor Young were prepared for testimony by Counsel for Consolidated. Both Futch and Young were impressive in their cooperative and unguarded demeanor while testifying and I credit them.

Figueroa and Rodriguez 19A Tests

Figueroa testified that since he began working for Respondent in 1998 he has been given road tests in 2000, 2002 and 2003. Figueroa recalled that in 2000 and 2002 the tests were administered by Verderosa who gave the drivers their test papers at the beginning of the session and instructed them to fill in their names and other personal data. Verderosa then instructed the drivers to put an incorrect date on the form and the drivers signed the forms and passed the tests, although they did not perform any inspection of the bus and did not demonstrate their actual driving skills. Figueroa's tests are in evidence. These documents show that on October 5, 2000 Figueroa took a 19A test administered by Certified Examiner William Ronecker and that he accumulated 15 points for two pre-trip inspection failings and for failing to "properly signal" while en route. On September 11, 2002 Figueroa's test was administered by Verderosa and he accumulated 20 points for two inspection failings and two en-route failings: Figueroa "failed to signal" on departing and he stopped "too far away" from the curb. On this last item, the printed test paper reads, "Stops too far away from or hits curb." Verderosa crossed out the words "or hits" in describing the problem. When his attention was called to the fact that the test took place after the shop steward election earlier in 2002, Figueroa maintained that despite the fact that the test was dated September 11, 2002 he could not say when he had taken the test.

On cross-examination by Counsel for Consolidated, Figueroa insisted repeatedly that he had never heard of Ronecker and had never met him. Figueroa was adamant that he had taken three tests with Verderosa and that on each occasion Verderosa had given him the wrong date to fill in for the test date "because that's the way he always does it." I conclude that Figueroa's credibility was seriously eroded by the fact that he insisted, despite documentary evidence, that he did not know Ronecker and had never been tested by Ronicker. Figueroa's March 19, 2003 test was administered by Verderosa in the Bronx. There is no dispute about the date this test was actually conducted yet Figueroa included this as one of the three tests when he was instructed to put the wrong date on the test sheet. I conclude that Figueroa was prepared to testify to certain facts and to recall events in a certain way without any reference to whether they were accurate or not. I conclude that Figueroa was not a reliable witness on the issue of the 19A tests.

Figueroa had an accident with his school bus on January 17, 2003 and he received a warning. The warning states that this was "an at-fault/preventable accident." Figueroa signed the document and he did not grieve the warning. Figueroa testified that he failed the 19A road test on March 19, 2003 and that he failed the follow-up test on March 27.

Figueroa testified that on March 19 several drivers were tested at the same time: Figueroa himself, Juan Carlos Rodriguez, Gaston Williams, Jorge Mendez, Jose Villarin and Geremais Rodriguez.[47] When Verderosa gave Figueroa and the other drivers the test papers to fill out he told them not to fill in the date. Then Verderosa gave Villarin, Geremais Rodriguez, Gaston Williams and Jorge Mendez various different dates to fill in. When Figueroa asked what

[46] Young was tested in October 2002 by Verderosa.

[47] Figueroa testified that he and Juan Carlos Rodriguez were tested more rigorously than the other drivers. He named Villarin as a driver who was not required to do a pre-trip inspection.

about dates for himself and Juan Carlos Rodriguez Verderosa stated that he forgot the date but he had it in the office. This testimony does not make sense. I have examined Figueroa's handwriting on his test papers in evidence and I find that Figueroa filled in the date of 3/19/03 in his own handwriting.

According to Figueroa, once he began the test Verderosa told him not to perform the brake test but to recite the necessary steps. Then, Figueroa drove the bus and Verderosa told him he failed because he had not adjusted the mirrors properly. Figueroa stated that after the test Verderosa told him and Rodriguez that companies named United and Atlantic were hiring and that they should go to those companies. Although the starting pay was less than Figueroa was earning, Verderosa said it was a benefit to be represented by Local 1181. Figueroa then changed his testimony to say that Verderosa did not tell him he had failed the test. Rather, Figueroa spoke over the telephone to Antoci who told him he had failed and said he would arrange for another test.

Figueroa testified that he went to Brooklyn to be retested on March 27.[48] Figueroa recalled that while taking this second 19A test he forgot to put on his seat belt, he made a turn into the wrong lane because there was a lot of traffic in the correct lane, and he did not honk when he passed some double parked vehicles because he believed there no passengers in them who might walk in front of his bus. At the end of the test the examiner informed Figueroa that he had failed and he explained the reasons for the failing score.

Verderosa testified that on March 19 he tested Figueroa and Rodriguez. He agreed with General Counsel's suggestion that there were four other employees to be tested. Verderosa was not asked to identify the other employees. He recalled that there was a group at the road test site but he could not recall whether they were all on the bus during the test. Verderosa's affidavit was used to refresh his recollection while he testified when called by General Counsel pursuant to FRCP 611 (c). [49] Verderosa stated that Antoci faxed him the list of drivers and that he had no conversation with Antoci about the test before he gave it. Verderosa recalled that during the test Figueroa was "arrogant". He would not properly execute the pre-trip inspection but just ran around the bus laughing. He did not conduct a proper test of the air brakes. Figueroa went through a full stop sign during the road test portion of the exam. Figueroa accumulated 70 points due to inadequacies in his performance. Verderosa told him that he had failed and said that he would help him pass the second time. Verderosa told Figueroa to come to him for help but Figueroa never showed up. Verderosa did not know whether Figueroa had been retested.

Verderosa said he did not recall mentioning the names of other companies to employees

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[48] Van Aken conducted this test.

[49] I formed the impression that Verderosa is a "hail fellow well met" personality who speaks easily and at great length to all who come his way. Indeed, Verderosa was unguarded and loquacious while testifying herein. Verderosa probably speaks as an "expert" on any subject he is asked about and it is probably easy to engage him in discussions where he would do better to refrain from speculating on the subject at hand. However, I do not believe that Verderosa took a cavalier attitude to his testimony herein. He was attentive to the questions posed by all counsel herein and he did not try to evade any questions. Based on my observation of Verderosa I conclude that he testified to the best of his ability based on his recollection of the events that took place. Verderosa was very careful to state when he did not have an explicit recollection of an event about which he was being asked. I do not believe that Verderosa would give untruthful testimony. I shall credit his testimony.

on March 19, 2003. The record shows that Verderosa works for Atlantic where he is a member of Local 1181. As I have found, Verderosa is a talkative person and it would not be surprising that he discussed all manner of subjects with the employees.

Joseph Van Aken testified that he had never heard of Figueroa before he tested him in Brooklyn on March 27.[50] He stated that Antoci had not told him anything about Figueroa before he conducted the test and that no one had told him to fail Figueroa. Van Aken recalled that Figueroa did a "pretty good" pre-trip inspection of the bus. However, during the driving portion of the test Figueroa did not use his seat belt. Further Figueroa lost points for making a bad left hand turn by turning into the wrong lane. In going around a double parked vehicle Figueroa failed to sound the horn to alert a person walking in front of the truck. Figueroa did not drive with both hands on the wheel as required. Figueroa did not know how to activate his amber pre-warning lights. The 19A test provides that if the driver "does not know NYS loading light procedures" this is an automatic disqualification. In addition, Figueroa accumulated 35 points for the failings listed above and for stopping too far away from the curb. Van Aken testified that after the test he explained all of these failings to Figueroa and asked him to sign the test. Figueroa signed the document. Van Aken recalled that when he handed the test document to Antoci after completing his assignments for the day, Antoci said he was impressed because Van Aken had been able to get drivers to sign even after being told that they had failed.

Rodriguez testified that he failed a road test given on March 19, 2003 and then he failed the follow-up test given on March 27, 2003.

Rodriguez testified that on March 19 Verderosa gave him and the other employees the test form to fill out and instructed all of them not to fill in the date. Rodriguez recalled some details about his own test but he mainly testified about the manner in which the test was administered to the other drivers present, claiming that they were not tested as rigorously. He stated that Verderosa called him and Figueroa aside after the test was completed and told them that companies named Atlantic and United were hiring and they had a union with a better salary. Rodriguez replied that he did not wish to change. In response to a leading question from Counsel for the General Counsel whether Verderosa ever gave him a date to put on the test form, Rodriguez testified that he and Figueroa told Verderosa not to forget to put the date on. Rodriguez also testified that Verderosa did not give any driver a date to put on the form at any time that day. I note that Rodriguez' March 19 test form contains the date written in what I find to be Rodriguez' handwriting. However, Rodriguez had put down the wrong year and Verderosa corrected it as will be seen from his testimony.

Rodriguez was not permitted to drive his bus route again that afternoon. He spoke to Antoci on the telephone. Antoci informed him that he had failed the test and said that he would find out what the next step would be.

Verderosa recalled that when he tested Rodriguez in the Bronx on March 19 Rodriguez put the wrong year in the space for the date on his test document. Verderosa corrected the date and initialed the correction. Rodriguez accumulated a total of 40 points for problems with his pre-trip inspection including failing to check the passenger entry and emergency exits, failing to check and adjust his mirrors and failing to check the air-brakes. During the driving test Rodriguez accumulated points for failing to check mirrors while driving, failing to anticipate

[50] Van Aken was a witness with an impressive demeanor. He took care to consider the questions asked by all Counsel in this proceeding and he answered them as fully as possible. It is clear that Van Aken is serious about his professional ethics. I shall credit his testimony.

hazards and excessive maneuvers in parking.

Rodriguez testified that he was retested on March 27 in Brooklyn.[51] Rodriguez maintained that the bus he drove had an ignition problem. Rodriguez recalled that he had a difference of opinion with the inspector as to the method of testing the air brakes.

Van Aken stated that he did not know anything about Rodriguez before he tested him on March 27 in Brooklyn; he had not been told to fail Rodriguez. Van Aken recalled that Rodriguez' pre-trip inspection was good outside the bus, but he did not check the emergency exits inside to make sure they were clear and he left out a portion of his air brake test. Rodriguez lost points driving out of the yard because his braking was very, very sharp. A memorable event for Van Aken was that Rodriguez could not start the bus: he twisted the throttle handle instead of pulling it out and Van Aken had to take over and do it for him. Van Aken himself had no trouble starting the bus. Once on the road, Rodriguez did 25 mph in a 15 mph marked school crossing zone. These speed zones are marked in large white letters on the pavement. When Van Aken asked Rodriguez what the white letters meant Rodriguez asked, "what white lettering, what are you talking about?" In front of the police station on Sutter Avenue Van Aken asked Rodriguez about another marked speed zone and again Rodriguez said he did not know what Van Aken was talking about. Van Aken then requested Rodriguez to pull over and he stopped much too far away from the curb. At this point, Van Aken took control of the vehicle. Rodriguez accumulated a failing score of 35 points. The failure to observe the proper speed was an automatic disqualification. After Van Aken explained to Rodriguez why he had failed Rodriguez signed the test document.

Van Aken recalled a driver whom he had failed on September 20, 2002; Cheney Gaston accumulated 70 points based on his pre-trip inspection and driving test. Gaston was retested by Ronicker on November 7, 2002 and he failed again with a total of 55 points.

The record shows that Figueroa and Rodriguez had a grievance prepared by TDU which they filed with Local 854 on or about March 21, 2003. The grievance states that they were suspended on March 19 in retaliation for their protected concerted activity and that the reason given, that they failed a road test, "is purely pretextual." On April 3 Stankowitz wrote to Figueroa about the grievance. She said that she had asked the "Shop Steward to provide the Union with information concerning your allegation that the suspension was pretextual. The Shop Steward has stated the other drivers have passed the behind-the-wheel test without actually taking the test. Although the significance of this allegation is unclear to me, we have requested the names of these individuals from the Shop Steward but he has been unwilling to provide the names." Stankowitz' letter went on to ask Figueroa to provide evidence to support his grievance that his suspension was pretextual and to inform him that without that evidence the Union could not proceed with his grievance.

Stankowitz testified that Rodriguez informed her that he had been suspended. Stankowitz, who had been informed by Antoci that Rodriguez and Figueroa were disqualified from driving because they had failed their 19A tests, told Rodriguez that he was disqualified and not suspended. Rodriguez complained to Stankowitz that he had been road tested less than two years ago.[52] When Stankowitz questioned Antoci he explained that the reason for Rodriguez' more frequent testing was that he had an accident on June 21, 2002 and a safety violation on February 14, 2003. Antoci said that he could test an employee frequently if he felt it

[51] Van Aken conducted this test.

[52] His previous test was on October 31, 2002.

was necessary.

Figueroa testified that he and Rodriguez went to see Antoci after they failed their 19A tests a second time. Antoci said they were disqualified from driving and that their next tests would be given by "Albany". Figueroa testified that he spoke to Antoci again the next day and Antoci informed him that Albany would not give him a test. Antoci said Figueroa could go to another company to take a driving test and that he would not interfere.[53] But Antoci cautioned that if the other company called him for a recommendation he would have to tell the truth. After speaking to Antoci Figueroa called Albany. In his testimony Figueroa did not specify whom he called or what agency the person worked for. According to Figueroa he was told that Albany never asks a person to take a test and that only a judge can take his license away. Figueroa stated that he did not ask for another test on this occasion because he believed that the Union should have sent him for another 19A test. Figueroa spoke to Gatto at the April 3, 2003 Union meeting about failing his 19A tests. Gatto advised him to apply for work at another bus company and to take another driving test. Gatto said if Figueroa and Rodriguez passed a 19A test they would have a better chance of fighting their case. Figueroa never took another 19A test. Instead, he took a course to become an automobile driving instructor and he now works as a driving instructor.

Rodriguez testified about the meeting he and Figueroa attended with Antoci the day after he failed his 19A test a second time. Rodriguez testified that Antoci told him he was "disqualified from driving a school bus, that I had to take the road test again at the Department of Motor Vehicles." The next day, Rodriguez spoke to Antoci over the telephone and Antoci told Rodriguez that if he went to any other bus company and took and passed the road test then he would be qualified or certified to drive. Rodriguez testified that he telephoned the Department of Motor Vehicles in Albany which informed him that he was still certified. The record does not show when this took place. Rodriguez testified that he went "downtown to motor vehicles" and obtained a copy of his qualification to drive. In fact, the record shows that Rodriguez went to his insurance company where he obtained a report from "United Software Developers Inc." on April 24, 2003. The report, which is addressed to Rodriguez' insurance agent, states that his 19A status is "Active – School Qualified." The document bears no indication of the provenance of this information and no official New York State imprimatur. Rodriguez testified that sometime after March 27 he took "a writing test" but he did not specify what this was for or whether it pertained to the 19A certification. Rodriguez did not state whether he had in fact passed the writing test. There is no record evidence that Rodriguez took a 19A test after March 2003 and Rodriguez testified that he has not asked Respondent Consolidated for a route since that time.

Discussion of Alleged Unfair Labor Practices

The General Counsel asserts that Verderosa was a "limited purpose agent" of Respondent and that he administered the tests to Figueroa and Rodriguez in a more exacting way than to the other employees who were tested that day and who did not fail their 19A tests. The General Counsel asserts that this was part of a plot to get rid of these two activists, alleging "Respondent must have instructed Verderosa to make sure he failed Rodriguez and Figueroa." Both Figueroa and Rodriguez testified that others were tested in a lax or inattentive manner by Verderosa. General Counsel argues that it is of no moment that the two employees failed their retests on March 27, 2003 because they never would have been retested but for the allegedly

[53] Before an employee begins work at a school bus company he must take and pass a 19A test given by that company. Thus, if Rodriguez and Figueroa had applied for work at another company and had passed a 19A test they would have been qualified to drive.

tainted test on March 19. General Counsel alleges that it is "hard to believe" that the second failure was legitimate because "the fix was in" with Van Aken.

The General Counsel asserts that Respondent Consolidated suspended Figueroa and Rodriguez on March 19 and discharged them on March 27 in retaliation for their protected activities.

I do not credit Figueroa and Rodriguez generally on the subject of their 19A tests. As discussed above, I am convinced from my reading of their testimony about the19A test that they did not testify accurately and that they were trying to justify their own failures on the tests.

I do not credit the identical testimony of General Counsel's witnesses that through many years of employment they and others were never required to perform an inspection or to drive the bus in order to pass their 19A exams. First, Verderosa and Van Aken, whom I credit, testified to the contrary. Then, it strains credulity that every year hundreds of drivers were taken to a bus by certified state examiners and given a passing grade without performing a test. What would be the reason for an examiner to risk his license by participating in such a fraud requiring the wholesale fabrication of hundreds of test results? Further, Guzman, a witness for the General Counsel, testified that during his 19A exam in 2001 he was required to drive the bus although he denied performing a pre-trip inspection. In April 2003 Guzman performed the pre-trip inspection and drove the bus while taking his 19A exam. As discussed below I find that Guzman was a witness who shaded his testimony to disfavor Respondent Consolidated. Although Estevez testified on direct examination that he had "never" performed a pre-trip inspection and never even drove the bus while taking the 19A test, on cross examination he admitted that he and all the other drivers performed the test in January 2004. I conclude that Estevez was willing to shade his testimony about the 19A tests to accommodate General Counsel's theory of the case that Rodriguez and Figueroa were singled out for especially exacting exams. Fleurimont also began his testimony by stating that he never took a 19A test even though a record of such a test is in evidence.

I find particularly convincing the testimony of drivers Futch and Young. These witnesses were not prepared by Counsel for Respondent Consolidated. They were subpoenaed by the Union to testify on another subject. However, when asked about their 19A tests they gave credible evidence that their exams always included the required pre-trip inspection and road driving test.

Moreover the confused testimony of Figueroa and Rodriguez that Verderosa gave employees the wrong dates to put on their test forms smacks of a prepared effort to discredit the testing procedure. Figueroa said Verderosa "always" gave employees the wrong dates. He also said on March 19 Verderosa gave the other employees the wrong dates but did not give Rodriguez or himself any dates because he had them in the office. Rodriguez testified that Verderosa did not give the dates to any of the drivers on March 19 and that after the test he and Figueroa told Verderosa not to forget to fill in the date. Yet I find that both of these employees wrote the date of March 19 in their own handwriting. Neither of these witnesses specifically denied that the date of March 19, 2003 was written in his own handwriting. Clearly both of these witnesses were trying to tell the same story but they failed to do so. I conclude that General Counsel's witnesses saw some advantage in trying to convince me that the dates written on their test papers were wrong and that they gave inaccurate testimony in support of this enterprise. I note that General Counsel's Exhibit # 62a and 62b, a summary prepared by Counsel for the General Counsel, does not support Figueroa's and Rodriguez' account of who was present for the March 19, 2003 test. Thus, Gaston Williams did not take a 19A test on March 19, 2003, Jorge Mendez was tested on March 4, 2003, Jose Villarin was tested on March

4, 2003 and Geremais Rodriguez did not take a test on March 19, 2003. The exhibit shows that Verderosa tested only Juan Carlos Rodriguez and Figueroa on March 19, 2003. Counsel for the General Counsel did not state on the record that the test papers for the other employees purportedly tested on March 19 were missing. Their test papers would have been important evidence in this case because Rodriguez and Figueroa testified that the other employees had been tested in a lax and undemanding fashion. It is the General Counsel's burden to prove that these other employees were tested together with Rodriguez and Figueroa on March 19 in a disparate manner. Yet these employees were not called to prove that they had been present on March 19 even though the documentary evidence summarized on General Counsel's own exhibit shows that they were not tested that day.

The General Counsel also urges that Figueroa and Rodriguez were singled out for testing. In response to subpoenas and requests for information by Counsel for the General Counsel, Respondent Consolidated turned over voluminous documents such as personnel records, records of road accidents sustained by drivers, records of 19A tests and the like. At the hearing Counsel for the General Counsel attempted to introduce summaries of the documents turned over by Respondent. Respondent Consolidated objected to the summaries on the ground that they were not accurate and that they left out crucial information that is necessary fairly to evaluate the records as a whole. I ruled that I would admit the summaries only when they accurately summarized the relevant underlying records in the possession of General Counsel and when the summaries included all necessary and relevant information.

Pursuant to the discussions at the hearing, General Counsel added certain names of alleged discriminatees that had been missing from GC Exhibits 62a and 62b and these Exhibits were admitted by Order dated August 6, 2004. GC Exhibit # 62a is an alphabetical listing of 19A exams given to employees from January 2001 to March 2004. The exhibit shows the name of the examiner and the score given to the driver. GC Exhibit # 62b is a chronological listing of these 19A exams.

At the hearing, Counsel for the General Counsel also attempted to introduce GC Exhibits 63a and 63b which purported to be chronological and alphabetical listings of accidents sustained by drivers from June 1, 2002 to March 15, 2004. The purpose of introducing these exhibits, according to General Counsel's theory of the case, was to show that Respondent Consolidated did not consistently follow its stated policy of testing drivers who had accidents within a certain time period. I rejected the proposed exhibits at the hearing because they did not include information showing which of the drivers listed on the exhibits had been terminated or had resigned after their accidents and they did not show the dates employment was terminated. The additional information is necessary because if a driver were discharged or had resigned after an accident the driver would not be available to be given a 19A test and the exhibit would thus be inaccurate. This problem with the data on GC Exhibit # 63 and the reason why I deemed it inaccurate and unreliable in its proposed form was discussed at length during the instant proceeding. I made it very clear that dates of employees' termination or resignation would have to be added to that exhibit in order for it to be admissible. Although given the opportunity to add the required information to GC Exhibits # 63a and 63b, Counsel for the General Counsel did not do so. My Order of August 6, 2004 therefore rejected the proposed exhibits. General Counsel has not explained why these exhibits were not corrected in compliance with my directions at the instant hearing. Even a cursory reading of Counsel for the General Counsel's Brief shows how important a corrected and accurate GC Exhibit # 63 would have been if the actual figures had indeed supported the argument set forth in the Brief. General Counsel's Brief argues that it is the Respondent Consolidated's obligation to correct the General Counsel's exhibits because it is in possession of employee termination records. I find this assertion surprising. Counsel for the General Counsel did not at any time ask for additional

time to obtain any records which might be necessary to correct the proffered exhibit. Given that the hearing initially closed in July 2004, that my ruling rejecting the exhibit was dated August 6, 2004 and that briefs were not submitted until March 2005, Counsel for the General Counsel had ample time to make an application for any assistance required to insure the admission of this important exhibit.

Because of Counsel for the General Counsel's failure to comply with my instructions to correct GC Exhibit # 63a and #63b it was not admitted. I shall therefore disregard any references in General Counsel's Brief to Rejected GC Exhibit # 63a and # 63b. I note that it would be exceedingly improper for me to consider any arguments based on Rejected GC Exhibit # 63a and 63b. Once the exhibit was rejected the other parties to this proceeding would naturally not refer to it in their briefs and they would make no arguments which might address those points in General Counsel's Brief based on the rejected exhibit. Because I rejected the exhibit due to a failure to add applicable termination or resignation dates, the other parties had no occasion to raise other issues relating to its accuracy and there has been no discussion whether the exhibit accurately reflects the documents it purports to be based on. It would be unjust to permit the other parties to this proceeding to rely on their belief that the exhibit was rejected and write their briefs accordingly, but then to consider the exhibit and the Brief in my decision.

Further, after the hearing was concluded in July 2004 Counsel for the General Counsel offered Exhibit # 64, a document which had not been proposed or discussed at the hearing. I rejected GC # 64 because it would be a denial of due process to admit, after the close of the hearing, a summary exhibit that the other parties had not had an opportunity to challenge on the record. For all the reasons stated above, I shall not consider any portions of the General Counsel's Brief based on Rejected GC Exhibit # 64.

The General Counsel argues that Respondent Consolidated tested Figueroa and Rodriguez in March 2003 as a result of animus toward their protected concerted and Union activities. General Counsel's Brief contends that Figueroa and Rodriguez were not due for tests until 2004, having been tested in 2002, and that no valid reason existed for testing them in March 2003. The General Counsel states that Figueroa and Rodriguez were tested more rigorously than the other employees who took the test on March 19, 2003. Further, the General Counsel argues that only one other employee has failed a 19A test in the period covered by GC Exhibit # 62 thus proving that Figueroa and Rodriguez were tested disparately. The General Counsel faults Respondent Consolidated for introducing evidence through Toya of Respondent's newly instituted policy of testing drivers who experienced an accident and urges that Curcio, Strippoli or Antoci would have been better qualified to testify about this.

Based on the testimony of Toya I find that after the fatal accident of February 2003 Respondent Consolidated implemented a policy of giving 19A tests to drivers who had a school bus accident at any time commencing one year before February 2003. As the company's former human resources manager, Toya had kept personnel files, attended grievance and termination meetings and processed documents for hiring and firing. Toya was thus an appropriate manager to testify about a personnel policy. Further, Toya was no longer employed by the company when she testified, and thus Toya could not be said to have any motive to shade her testimony to help her employer. Moreover, Toya had an impressive demeanor which convinced me that she was a reliable witness who would only testify to those facts she remembered with certainty. In addition I rely strongly on driver Tracy Futch who testified from personal knowledge that a driver who had an accident would be tested more often than the state-required interval of once every two years.

I have found above that Figueroa engaged in protected concerted and Union activities on behalf of TDU. It is clear that Figueroa was hardly a major figure in the group of activists at the Bronx yards. When other TDU supporters testified herein about their fellow activists they mentioned Figueroa much less frequently than most other employees as one who engaged openly in the various protected activities. However, there is no doubt that company officials harbored animus against the TDU supporters. In the absence of testimony to the contrary by a witness with personal knowledge of the decision to send Figueroa for a 19A test on March 19, I find that a motivation for testing Figueroa was that he engaged in protected concerted and Union activities. But there are other significant factors that must be considered. Figueroa had an accident with his school bus on January 17, 2003 just weeks before the February fatal accident that triggered the company's new testing policy. Figueroa was given a written warning for "an at-fault/preventable accident" occurring on January 17, 2003 and he did not deny the accident nor did he grieve the warning. Figueroa was sent for his 19A test on March 19, just weeks after the February fatal accident and the implementation of the new testing policy. I believe that the close timing of the new testing policy with Figueroa's accident and his 19A test are compelling in this instance. Thus, although I find that Respondent Consolidated was motivated to test Figueroa out of animus to his protected activities, I also find that the company would have ordered Figueroa to take a 19A test without regard to his protected concerted and Union activities because he had an accident with his school bus in January. I do not find that the testing of Figueroa on March 19 violated the Act. *Wright Line*, 251 NLRB 1083 (1980).

As discussed above in the section dealing with the following of Rodriguez on his route, the record shows that Rodriguez was given a written warning on June 30, 2002 for a school bus accident. Rodriguez did not deny the accident and he did not file a grievance. I have found above that Rodriguez unlawfully was followed and videotaped and issued a written warning on February 14, 2003 because he engaged in protected concerted and Union activities. The testing of Rodriguez on March 19, 2003 so soon after Respondent Consolidated unlawfully followed and disciplined him, and so long after his accident in June 2002, leads me to conclude that the company singled out Rodriguez for testing on March 19, 2003 because he engaged in protected concerted and Union activities. Respondent Consolidated thus violated Section 8 (a) (1) and (3) of the Act.

As discussed above I have found that Verderosa is a credible witness. I have found, based on my discussion above, that Figueroa is not a reliable witness and I find that Figueroa's description of his 19A test is not accurate. Further, Figueroa did not deny going through a stop sign during his test with Verderosa. I have also found above that Van Aken is a reliable witness. Figueroa confirmed having taken most of the improper actions for which Van Aken charged him points, but he challenged Van Aken's judgment. There is no basis for an ALJ to discount the judgment of a state certified examiner on a 19A road test. Thus, I conclude that Figueroa failed the two tests as described by Verderosa and Van Aken. I do not find that Respondent Consolidated asked Verderosa or Van Aken to fail him as suggested in General Counsel's Brief.

As noted above, I do not find that Rodriguez is a reliable or accurate witness concerning the 19A tests. Further, Rodriguez did not dispute any of the problems noted by Verderosa on his March 19 test document. Significantly, Van Aken described all of Rodriguez' failings of March 27 in great and convincing detail. I credit him that Rodriguez did not know how to work the throttle. Rodriguez did not dispute Van Aken's findings concerning his failure to observe the proper speed in a safety zone. Rodriguez confirmed that Van Aken had not approved his method of testing the air brakes. I conclude that Rodriguez failed the two tests as described by Verderosa and Van Aken and that Respondent Consolidated did not ask the examiners to fail him.

As stated above, I do not credit any of the testimony purporting to show that Rodriguez and Figueroa were tested more stringently than other drivers. I find no significance in the fact that General Counsel was able to name only one other driver who failed a 19A test in the period covered by GC Exhibit # 62. The General Counsel would have me assume that many more drivers would have failed if the test were administered equally. The record does not contain any basis for this assumption. Moreover, the facts before me militate against any such assumption. The school bus drivers are subject to stringent state regulation. They are mandated to undergo special training in order to drive a school bus and they must attend periodic safety training once they begin work. Thus, any driver taking a 19A test has been trained and retrained annually on a consistent basis. Drivers are paid to perform a pre-trip inspection before taking their buses out every morning and drivers are on the road every school day exercising their skills. It is not surprising that a driver in a formal test situation who knows that his or her job is at stake would take care to drive well enough to pass the 19A test. One need not achieve a perfect score to pass the test; it is necessary only to avoid major disqualifying mistakes and to avoid too many minor errors. A 19A test is not the equivalent of the bar exam.

The record shows that Rodriguez and Figueroa were disqualified from driving a school bus for Respondent Consolidated until they passed another 19A test. Neither of them took another 19A test. Both testified that Antoci told them to take and pass another 19A test so that they could be qualified to drive a school bus again. Antoci informed them that they could be tested by the State Department of Motor Vehicles or, if they chose to seek work elsewhere, they could be tested by another employer. Gatto also advised them to take a test to improve their chances of winning the grievance they filed after they failed on March 19, 2003.

I have found above that both Verderosa and Van Aken fairly administered the 19A tests to Rodriguez and Figueroa. It is undisputed herein that a driver who fails a 19A test is disqualified from driving until he passes a subsequent test. Upon failing the first test on March 19 Rodriguez and Figueroa were disqualified from driving a school bus. Thus, I do not find that the company unlawfully suspended them on March 19. Similarly, when they both failed the retest on March 27 they could not lawfully drive for Respondent Consolidated because they were still disqualified from driving by New York State law. Neither driver took steps to take another test to regain his ability to drive a school bus. Thus I do not find that Respondent Consolidated unlawfully discharged and refused to reinstate Rodriguez and Figueroa.

I have found above that Respondent Consolidated did not unlawfully single out Figueroa for testing on March 19 or March 27. Therefore Figueroa is not entitled to any relief in this decision. I have found that the company unlawfully singled out Juan Carlos Rodriguez for testing on March 19. However, I have also found that Rodriguez failed the test on March 19 and failed again on March 27. I shall discuss the issue of Rodriguez' relief in the Remedy section of this decision.

K. Verderosa's Statements to Guzman

The General Counsel contends that Verderosa is an agent of Respondent and that Verderosa made certain unlawful statements to Guzman which constituted interrogation, a threat of discharge and unspecified reprisals and created an impression of surveillance.

Guzman testified that he took a 19A test administered by Verderosa on April 2, 2003.[54]

[54] Guzman testified through an interpreter. I conclude that Guzman is fluent in English because Guzman often answered the questions put to him before the interpreter had finished

Continued

Guzman testified that Verderosa advised him to close his mouth and get involved in your own business. If Guzman did something, Verderosa said, he should do it through the appropriate procedure with the Union. If you do things your own way the company will look for a reason to fire you when you have the next accident. According to Guzman, Verderosa said that if Guzman did something with the Union the company would put drugs in his bus so they could fire him. Guzman testified that he had taped the conversation with Verderosa and that Verderosa had asked whether he was being taped. Guzman denied to Verderosa that he was taping him. Guzman stated that Verderosa assured him that, "he has many years of experience, that he can go to the company, pick up his money and go and leave; that he picks up his money and he goes, he doesn't care about anything."

Verderosa testified that he recalled administering the 19A test to Guzman in April 2003 and that Guzman passed his test "with flying colors." Verderosa testified that employees from all the companies he deals with ask him questions about various unions "all the time" because they think he has all the knowledge. Verderosa said that he usually advises employees to talk to their union and to their employers and to follow procedures. If employees do not follow procedures they will be fired: this is true at Verderosa's own company as well. Verderosa stated that if Guzman had mentioned his duties as a shop steward he would have discussed a shop steward's duties with Guzman. He would have told Guzman to do things the right way. Verderosa did not recall telling Guzman that the Union and the Company would go after him if he did not do things the right way. He did not recall saying that the Company would fire him for the next accident. Verderosa specifically denied telling Guzman that the company would plant drugs in his bus. General Counsel subpoenaed Verderosa to testify herein. Although Verderosa stated that he could not recall certain things, Counsel for the General Counsel made no attempt to refresh Verderosa's recollection by playing Guzman's purported tape recording of their conversation. I note that I specifically instructed all counsel that it was proper to play a tape recording of a conversation to a witness in order to refresh his recollection or to impeach his testimony.

The General Counsel bears the burden of proving that Verderosa is an agent of Respondent. The Board applies common law principles of agency when determining whether a person is an agent of the employer. The General Counsel has not argued that the record shows that Verderosa had actual authority to interrogate or threaten Respondent's employees. I assume that General Counsel would urge that Verderosa had apparent authority to speak on behalf of the employer.

The Board has stated that, "Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. … Two conditions,

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translating them and Guzman often corrected the interpreter's English translation. I observed that Guzman was extremely non-cooperative on cross examination by Counsel for Respondent Consolidated. He repeatedly tried to evade the questions posed to him and would not answer the exact question that had been asked. On one subject Guzman even refused to answer directly a question posed to him by the ALJ. Further, Guzman's testimony was inconsistent at various points. By carefully observing Guzman throughout his lengthy testimony I formed the impression that Guzman would say anything that came into his head against the Union and the Company, no matter how outrageous. He adopted a manipulative attitude toward his testimony that was not restrained by any sense of proportion. As can be seen in various portions of this decision, Guzman's testimony was at variance with the documents in the record. Guzman is the epitome of the unreliable witness. I shall not credit his testimony.

therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity." (Citations omitted) *Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988).

The General Counsel has cited *Alliance Rubber Co.*, 286 NLRB 645-46 (1987), in support of the proposition that Verderosa is a "limited purpose agent." In that case the Board found that where the employer encouraged its employees to submit to polygraph tests concerning sabotage at the plant, questions related to union activity were within the general scope of the authority granted to the polygraphists. The Board also rested its finding of agency on the doctrine of apparent authority, finding that the employer's conduct "reasonably led employees to believe that questions asked … in the course of the polygraph examinations were asked on behalf of [the employer]."

The record establishes that Verderosa was known to the employees in the Bronx as one person, among others, who administered road tests. Verderosa did not assign work and he did not discipline employees. Indeed, employees saw Verderosa only when they took a road test and if he taught the safety class to which they were assigned. There is no record evidence that Verderosa was the only contractor hired to conduct the safety classes. Thus, employees might see Verderosa once every one, two, or four years, or less frequently. There is no record evidence that Respondent ever manifested to its employees that Verderosa could influence their assignments or their job security other than through the administration of the 19A test. Nor does the record contain any statement by Verderosa that he could affect drivers in any way other than by passing or failing them on the 19A test. Thus, the first condition of the test for apparent authority has not been satisfied. As to the second condition, there is no evidence that Guzman believed that Verderosa had the authority to interrogate, threaten or surveil him on behalf of the Respondent. Guzman clearly knew that Verderosa was an independent contractor who could "pick up his money and leave" the company and who did not care about anything. In these circumstances Guzman knew that Verderosa considered himself independent of and not beholden to the company. Guzman could not have a reasonable basis for believing that Verderosa had been given authority by the Respondent to speak to him about Union matters because Verderosa had just proclaimed the fact that he did not care about the company, he could just take his money and leave.

Further, I do not believe that the conversation related by Guzman came about in the way Guzman testified and I do not credit Guzman's version of the conversation. I credit Verderosa that employees ask him for all sorts of advice and often speak to him about union issues. Verderosa readily conceded that he would have engaged in a discussion of the issues if Guzman had raised the subject of his position as shop steward. Verderosa would have said that Guzman should follow proper procedures. Verderosa denied telling Guzman that the company would plant drugs in his bus. Verderosa could not recall telling Guzman that the company would discharge him for his next accident or for his Union activities. Because I have found Guzman to be a witness who is not reliable I do not credit any of Guzman's assertions about his conversation with Verderosa. I find that Guzman came to his test equipped with a recording device and engaged Verderosa in conversation about his union activities. I do not find that Verderosa threatened, interrogated or gave the impression to Guzman that his activities were under surveillance by Respondent Consolidated.

L. Complaints to the Department of Education and Company Reaction

Employees Meet Department of Education Officials

On March 21, 2003, approximately 12 employees went to a New York City Department of Education office to complain about Respondent Consolidated.

Guzman testified that the group told the public officials with whom they met about "irregularities" at the company. They said that drivers were being followed in reprisal for Union activity. The Board representative told the employees to go to the Union for redress but Guzman said that the company and the Union were working together against the employees. Rodriguez said he had failed a road test and he asked for a witness at his next test, but the official refused to provide one.

Rodriguez recalled that he attended the meeting with Figueroa, Fleurimont, Guzman, Estevez, Garces and others. The Department of Education officials said they wanted to hear about any actions that placed children at risk. Fleurimont asked whether the company had reported an accident he had in the month of January.

Estevez recalled that the group included Victor Irizarry, Santiago Jimenez, Robert Perez, Johnny Salgado, Felipe Bourdier, Fleurimont and Guzman.

Garces testified that he went to the Department of Education with Figueroa, Rodriguez, Guzman, Fleurimont, Estevez, Victor Irizarry, Victor Gutierrez, Johnny Salgado, "Felix" and Santiago Jimenez. Rodriguez told the Department representatives that the Union is repressive and is controlled by the boss. Gutierrez said the company was forcing him to drive extra routes and this was difficult because he lived in New Jersey. Fleurimont said he was fired for an accident he never had. Figueroa complained that the company was following drivers on the road. Garces did not speak at the meeting.

Company Officials Meet with Employees and Threaten Discipline

Curcio testified that a representative of the Department of Education called and told him that his employees had gone there to "babble" to an investigative unit. The person who called Curcio was unhappy with the group because the employees had not followed proper procedure. The Department representative told Curcio the employees should have used the grievance procedure and he told Curcio to talk to his employees. Curcio called a meeting with the employees who had visited the Department of Education . Curcio did not know the identity of those employees so the dispatchers made a radio announcement that anybody who went to the Department of Education should report to Snedicker for a meeting. Curcio testified that he was annoyed with these employees because they had put a mark against the company at the Department of Education and he expressed this to the employees. He told them that they should follow the correct procedure.

On March 24, 2003 Guzman received a note instructing him to report back to the Zerega yard right after his run and get on a bus that would be waiting to take him to a meeting in Brooklyn. Guzman telephoned Stankowitz and asked her why there was a meeting in Brooklyn. Stankowitz had not heard about it and Guzman suggested she call Antoci to find out. A bit later Guzman called the Union office and was told that Stankowitz had gone to Brooklyn and would wait there for the employees.

Stankowitz testified that Guzman called her to say that there was a meeting at the company office in Brooklyn about a Department of Education visit. Guzman was the acting shop steward at this time. Guzman told Stankowitz that he wanted the Union to represent the employees. Stankowitz asked Guzman if he knew why the employees were being called to Brooklyn. Guzman did not give her a reason. Stankowitz then spoke to Gatto who instructed

her to go to Brooklyn. Stankowitz arrived at the company's Brooklyn office at 10 or 10:30 and found Guzman and the other employees there. She asked Guzman what they were there for but he did not respond. Stankowitz testified that she sat and waited for someone to tell her why they were all there. Then Curcio came in with Strippoli, Antoci, Joanne Toiche and Maria Toya.[55] Curcio made a speech saying that he was upset that the drivers had gone to the Department of Education and, in effect, complained to his boss. Antoci took out a camera and took pictures of all the drivers and Stankowitz. Curcio said that employees had gone to the Department on his time with his vehicle. He was upset that they did not follow the procedure of going to the employer or the Union first. Curcio said he would go to the Department of Education with the pictures and identify those who had attended the earlier meeting. He said he wanted to give everybody a "paper suspension" that would have no financial consequences. Stankowitz had not known before Curcio began to speak that these employees had gone to the Department or why they had gone. Stankowitz testified that she did not say anything while Curcio was present and she did not ask who had gone to the Department. When Stankowitz returned to her office she called Toiche and said that without proof of which employees went to the Board there could be no paper suspensions. In fact, no employees received any suspensions. The Union later sent a letter to all those at the Brooklyn meeting stating:

> After discussion with the employer in which the Union stated unless there was absolute proof of wrong doing there was to be no paper suspension, your employer has reconsidered and there will be nothing added to your personnel file.

Guzman testified that Stankowitz met with the employees first. She said did not know what the meeting was about and asked them what was going on. Stankowitz asked them who went to the Department of Education and why they had gone there. Guzman did not tell Stankowitz why the employees had met with the Department of Education. Guzman testified herein that it was not Stankowitz' job to find out why they had gone but only to investigate a grievance. Guzman accused Stankowitz of "interrogating" the employees. According to Guzman Stankowitz said they should have come to the Union.[56] The meeting with management began when Curcio, Strippoli, Antoci, Toya and "Joe B" came in and Antoci took pictures of the employees present. Curcio accused the employees of vandalism to the vehicles in the Bronx. When Guzman asked Curcio if he really believed that, Curcio said, "If it wasn't you then you sent someone to do it." Guzman testified that Stankowitz continued to ask who had gone to the Department of Education after the management representatives entered the room.

Estevez also received a note instructing him to attend the meeting in the company offices. A company van took employees to Brooklyn. These employees were Roberto Perez, Raphael Perez, Felipe Bourdier, Garces, Guzman, Victor Irizarry and Jose Naranjo. Estevez testified that both Antoci and Stankowitz asked who had gone to the Department of Education. Stankowitz said that "we had problems because you went to the Board of Ed without the consent of the Union." A company representative Estevez identified as John Garsus said he would issue a violation and that Stankowitz would take the names of the people. Guzman said

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[55] Toiche is not further identified herein.

[56] Contrary to General Counsel's Brief, Guzman did not testify that Stankowitz told him it was illegal to go to the Board of Education. The testimony reads, "I asked Ms. Stankovich what about illegal to go to the Board of Ed. She replied because – go to the Board of Ed – co-workers who did not pass the exam. She went to a book which had some rules about the motor vehicle. She read. It says here that the company has to give the exam every two years." Guzman's testimony refers to the legality of giving Rodriguez and Figueroa a test more frequently than once every two years.

they could not issue a violation for that. After Antoci took a picture of the employees Garsus said they would not issue a violation and they would pay the employees for the day.

Garces testified that the employees had called Stankowitz "because we wanted to be represented." On direct examination Garces testified that when Stankowitz met with the employees she asked why they had gone to the Department of Education. Guzman told her she did not have to ask that question. Then Curcio came in with Strippoli, Maria Toya, Joe B and Joe Antoci. Curcio said his "boss" had called him and said the drivers had been at the Department of Education. He wanted them to be identified. Curcio said if there were problems they should speak to Curcio or to the Union. Curcio said the men were gangsters: he remembered the vandalism and he was still trying to find out who did it. Gutierrez complained that he had extra routes and he lived in New Jersey. Garces told Curcio that Strippoli and Tommy disrespect the drivers and talk to them like animals. Curcio said he had to make an example out of the employees and he would suspend them. Garces recalled that when Curcio stopped talking he asked Stankowitz how it went and she said OK. On cross-examination Garces stated that Stankowitz did not ask why the employees had gone to the Department of Education; she asked who had gone. Garces acknowledged that it would be important for Stankowitz to know who went to the Department of Education in order to represent them. Garces said the employees did not tell her what was going on. Garces thought that the company should have told Stankowitz the purpose of the meeting.

Garces was the Local 854 shop steward when he testified herein. He stated that the shop steward is not the representative of the Union. He said his duties as a shop steward were to "defend drivers against injustices performed by the Union and the company." He expressed the opinion that "they" make sure the drivers' educational level is low in order to take advantage of them. Garces could not state how many holidays were provided in the collective-bargaining agreement nor could he state what the wage scale was.

Curcio acknowledged that he was angry because his employees went to the authorities with their complaints instead of speaking to management or the Union. Curcio had been told to control his people. It is clear that Curcio berated the employees for going to the Department of Education and airing their complaints. It is clear that he admonished the employees for their actions and told them they should have gone through the Union or the company. There is no dispute that Antoci took pictures of the employees present at the meeting in order to identify who had gone to complain to the Department of Education. It is also clear that Curcio threatened the employees with suspensions, albeit with no economic consequences, because they had complained about working conditions to the Department of Education. Contrary to General Counsel's Brief, no witness testified that Curcio threatened to have the employees discharged or arrested for their visit to the Department of Education.

Discussion of Alleged Unfair Labor Practices

The General Counsel contends that Curcio's statements to the employees created the impression of and constituted surveillance of their protected concerted activities, constituted coercive interrogation of the concerted activities, and amounted to an unlawful threat to discharge and arrest employees in retaliation for their concerted activities. Curcio's conduct is alleged to violate Section 8 (a) (1) of the Act.

It requires no extended discussion to show that the employees who visited the Department of Education were engaged in concerted activity. These employees were complaining about their working conditions, alleging that they were being followed on their routes in reprisal for protected activities, that their Union was repressive and controlled by the

company, that they were unfairly assigned extra routes and that they were subjected to unfair testing and discharge. The employees' concerted activity did not lose the protection of the Act because they complained to the Department of Education. Disparaging the employer to the funding source is not *per se* unprotected, but such an action will lose the protection of the Act if it is sufficiently disloyal, reckless or maliciously untrue. *Delta Health Center*, 310 NLRB 26, 43 (1993). It is uncontested that the employees herein did not disparage the quality of service provided by the company to the pupils it transported. Thus, they were not disloyal to their employer. The employees complained that they were followed in reprisal for protected activities, an allegation which I have found above to be true. The employees told the Department that they were unfairly assigned extra routes and subjected to unfair testing and discharge. In the case of Fleurimont, an arbitrator held that his discharge was not justified and ordered full relief. Although I have not found that employees were unfairly assigned extra routes or subjected to unfair testing, these complaints cannot be said to be reckless or maliciously untrue. In the case of Rodriguez' and Figueroa's tests, the General Counsel found enough merit to issue a complaint. In summary, I do not find that the complaints to the Department of Education were disloyal, reckless or maliciously untrue. Therefore, the employees' complaints to the Department of Education were protected by the Act.

I find that on March 24, 2003 Curcio coercively interrogated employees about their protected concerted activities and threatened to impose discipline on employees for engaging in these activities. The taking of photographs to identify the employees who visited the Department of Education amounted to surveillance of their protected concerted activities. By these actions Respondent Consolidated violated Section 8 (a) (1) of the Act.

The General Counsel contends that the Union, through Stankowitz, coercively interrogated employees and failed to represent employees during coercive conduct by Curcio.

It is evident that all the witnesses remember a somewhat different version of the events of March 24. All the witnesses agree, however, that employees called the Union for representation and that Stankowitz did not know why they were meeting at the company's offices in Brooklyn. Stankowitz recalled that Guzman had said that the meeting was about a Department of Education visit. Stankowitz tried to find out what the issue was when she met privately with the employees before the company representatives came in but none of the employees was willing to tell her about the situation. I credit Stankowitz that until Curcio made his speech she did not know that the employees had visited the Department in order to voice various complaints. The employees who testified do not agree whether Stankowitz asked why they had gone to the Board of Education or who had gone. Indeed, the answer to each of these questions would have been helpful to Stankowitz who was charged with representing the employees at a meeting with the company during which there was talk of suspensions. Estevez' testimony that Stankowitz was taking employee names for the company is gratuitous. It is evident that the names of all of those whom the employer was threatening to discipline would be necessary to the Union if it was to fulfill its legal duty to represent the employees in fighting the discipline. It would be negligent for a Union agent to represent a group of employees being disciplined by the employer without writing down their names. There is absolutely no evidence that Stankowitz gave any names to the employer. I also credit Stankowitz that she did not say anything while Curcio was in the room. Thus, I do not find that Stankowitz was seeking information about the employees' complaints while management was present.

I find that General Counsel's witnesses who testified herein were primed to accuse Stankowitz of misdeeds without regard to what actually occurred. These witnesses are hostile to the Union which they repeatedly, and without any evidence, accused of being in cahoots with

the employer. These witnesses met with Stankowitz before management entered the room and they refused to give her the information that would have permitted her to represent them effectively. I have found herein that Guzman is not a credible witness and I do not rely on his testimony about this meeting. I do not credit Estevez that Stankowitz said, in the presence of the company, that "we had problems because you went to the Board of Ed without the consent of the Union." Stankowitz credibly testified that she did not say anything while management was present. All of the other witnesses agreed, and Curcio admitted, that he told the employees they had to work through the Union grievance procedure to resolve their problems. I find that Stankowitz did not make any such statements. As set forth above I do not credit Estevez that Stankowitz was taking names for the company. I do not credit Garces that Curcio asked Stankowitz how it went and she said, "OK." I have found above that Garces is not a credible witness and I credit Stankowitz that she did not speak while management was in the room.

The General Counsel's position on this point defies reason. All of General Counsel's witnesses agree that they absolutely refused to give Stankowitz any information about why they had been called to the meeting with management. Thus, it was impossible for Stankowitz to give effective representation to the employees while Curcio was speaking to them. Stankowitz did not know whether any of the employees present had actually been among those who went to the Department of Education since they had refused to give her this information. Stankowitz did not know what they had said to the public officials because, again, the employees had refused to tell her anything. The General Counsel has not explained how Stankowitz could have replied to Curcio without even the most basic information about the issue under discussion. In the circumstances, Stankowitz took the only prudent course; she listened to what was going on and she said nothing. After the meeting was over, Stankowitz fully and effectively represented the employees: she obtained rescission of management's intention to give the employees a "paper suspension." As stated above, I do not find anything improper in Stankowitz' questions before the meeting when she sought to find out who had gone to the Department and why they had gone. Stankowitz could not effectively represent the employees without this information. Thus, I do not find that the Union violated Section 8 (b) (1) (A) of the Act on March 24, 2003.

M. Jose Guzman Request for a Leave of Absence

Testimony and Evidence

Pursuant to the collective-bargaining agreement between Local 854 and Consolidated a leave of absence is granted based on good cause such as death or illness for up to three months subject to reasonable extension. The contract provides that, except as required by law, a leave of absence will only be granted when "mutually agreed by the Employer and the Union."

Jose Guzman testified that in January 2003 he applied to work for New York Bus Service, a company he had applied to before. Guzman believed that in the long term New York Bus has better pension and medical benefits than Consolidated. After three years on the job Guzman, stated, he would earn more at New York Bus.[57] Apparently, Guzman did not get a job with New York Bus in January.

Guzman testified that he asked Respondent Consolidated for a leave of absence for "personal reasons" in May 2003. He also ran for shop steward at that time. Guzman testified

[57] Guzman recalled that he had wanted the higher wages paid under the Local 1181 contract when he and the other unit members had held meetings calling for "change."

that he wanted to be shop steward out of his concern that the members get the help they had not received in the past.

Guzman's subsequent attempt to obtain work at New York Bus for the 2003-2004 school year and Guzman's September 4, 2003 request for a leave of absence from Respondent Consolidated were the subject of widely varying testimony.

On July 14, 2003 Guzman filled out an application for employment with New York Bus. He wrote that his reason for leaving Consolidated was "better benefits." That same day he was offered a job by New York Bus and he accepted it. At this time Guzman was on vacation from Consolidated, having chosen not to take any summer work. Guzman completed the paid training period for New York Bus and on August 7, 2003, New York Bus certified that Guzman had successfully completed the training and would be officially employed on August 12, 2003. He received an express bus run as his summer assignment.

Guzman had informed Strippoli that he would be training for certification as a 19A instructor during the summer of 2003. He did not tell the company, or the Union, that he had applied to New York Bus and that he was training with that company. In fact Guzman did not take the 19A certification test in the summer of 2003. I note that Guzman refused to answer certain questions put to him in the instant proceeding which related to his purported 19A certification and his failure to work in the summer.

Guzman testified that the New York Bus pick for the regular school year was held on August 20, 2003, one week before the Consolidated pick. Guzman testified, inconsistently, that he did not attend the New York Bus pick and that he had chosen a route with New York Bus at the pick. Guzman also testified that he only obtained a permanent route with New York Bus on the last day of August or the first day of September. At another point in his testimony Guzman stated that he was not sure he would get a full time job with New York Bus on September 4. On that day, as will be seen below, he asked Curcio for a leave of absence. Guzman did not explain these discrepancies.

Guzman attended the August 27, 2003 Consolidated pick and selected a route. As described above, this was the pick at which Gatto informed Local 854 members that there was work available in a newly acquired Local 1181 shop and that Local 854 members could have those routes in order of seniority. Guzman testified that Gatto told him that the 1181 work offered more benefits and a better salary. Guzman was the Local 854 shop steward at that time and the work was first offered to him and to Victor Irizarry, his assistant shop steward. According to Guzman, Gatto drove him to Brooklyn so that he could speak to Curcio about this offer and Gatto tried to persuade him to take the work. Guzman testified that he did not take the 1181 work because, "I'd be selling myself." Of course, Guzman was already working for New York Bus on the day of the Consolidated pick.

Guzman testified that after the August 27 Consolidated pick he informed Gatto that he was thinking of taking another job. (Guzman acknowledged that he did not tell Gatto he already had a full time route with New York Bus.) The probation period at the new company was over one year. Guzman stated that Gatto told him to take a leave of absence and "offered" him an 18 month leave. Gatto told Guzman if the Union and the company agreed that he could take more than the 90 day contractual leave period there would be no problem. When Guzman asked whether the company would approve, Gatto said, "No problem" and he promised to prepare a letter for Guzman's signature. The Union gave Guzman a letter dated September 2, 2003, which stated that he was requesting a personal leave of absence for no more than 18 months to attend to personal matters "without any loss in wages or benefits." Guzman was not satisfied

with the wording of the letter and Gatto agreed to add some language requested by Guzman. On September 3 Guzman received a letter addressed to him from Gatto stating:

> This letter is to inform you that Local 854 has represented you in your request of Consolidated Bus Transit to grant you an eighteen (18) month leave of absence to seek other employment.
>
> As per the Collective Bargaining Agreement, both parties are to mutually agree in granting a leave of absence.
>
> Let this serve as the Union's approval of this leave of absence.

According to Guzman, Gatto informed him that the company had agreed to the letter.

Gatto testified that on the day of the pick for the 2003-2004 school year Guzman mentioned that he was thinking of working for another company. Guzman told Gatto he wanted a leave of absence for this purpose. Gatto testified that he informed Guzman that it was not usual for the company to give a leave so that an employee can get another job. In fact, Gatto is unaware of any employee who has been given a leave of absence to look for other work. Pursuant to Guzman's request, Gatto spoke to Curcio and told him that Guzman wanted a leave "for personal reasons." Gatto recalled that Guzman asked him to write a letter to the company asking for a leave of absence but without telling the company that Guzman was obtaining other employment. Gatto thought this was deceitful. Guzman told Gatto that if he did not write the letter he would make life miserable for Gatto. Gatto stated that the Union usually agrees for any member to obtain a leave of absence. Gatto wrote a letter stating that the Union would agree to a leave of 18 months.

Guzman testified that on September 4 he met with Curcio, Antoci and Toya. Curcio asked what was going on. Guzman told him that he was thinking of working for another company. Guzman said he needed a letter granting him a leave of absence. Curcio said it was not legal. Curcio offered to give Guzman a letter saying he was on leave for personal reasons but Guzman refused saying that the letter must specify that he was on another job. Curcio offered to give Guzman a letter that said he could not return for two years but Guzman rejected that offer. Curcio told Guzman that he had a pile of complaints that Guzman and others had filed against him. He offered Guzman a leave of 18 months if he returned to an 1181 unit. Curcio said 1181 had good benefits. Curcio said that if Guzman returned to Local 854 he would be greeted by applause but in 1181 they would pull him by the ear. Guzman did not accept that offer. Guzman testified that he did not tell Curcio that he had already chosen a route for a full-time job with New York Bus. Guzman recalled that Toya said that two employees had been denied leaves to work for another employer.

Guzman gave Curcio a letter which had been prepared for him by an unidentified lawyer requesting an 18 month leave to work for another company. The letter requested that Consolidated confirm in writing that it had approved his leave "with no loss of salary, benefits, seniority, etc." and that the leave was approved "in accordance with the guidelines outlined in the collective bargaining agreement."

According to Gatto, he was supposed to be at the meeting with Curcio. Guzman had told him that he wanted to meet with Curcio and Gatto had agreed to meet Guzman at the company office on Thursday, September 4. Gatto arrived at 8:30 or 9 AM and he waited for Guzman in the yard for about two hours but Guzman did not appear. Gatto assumed that Guzman had changed his mind. Since Gatto was on his way to Washington on Union business

he eventually he left the yard. Gatto could not recall whether he spoke to Curcio that day to tell him that Guzman had not shown up.

Guzman testified that Gatto called him on his cell phone immediately after his meeting with Curcio. Gatto asked what happened. When Guzman said the company was not giving what they promised Gatto said he would call again later. Gatto called again and told Guzman that Curcio would give him what he wanted and the letter would say whatever Guzman specified. Guzman told Toya that he was getting his leave and Toya made a phone call and said, "OK, you have it." Toya instructed Guzman to pick up the letter on Friday because the company lawyer had to draft it.

Gatto denied that he ever called Guzman to tell him he had his leave of absence from the company.

Guzman testified that he also informed Antoci that the company had agreed to his request for a leave of absence. Guzman asked Antoci for a release for the Department of Education. Antoci gave Guzman a "Notification of Employment Action Form" dated September 4, 2003 which showed that Guzman had resigned his employment with Consolidated. Guzman needed this form to begin working for New York Bus as a school bus driver.

Guzman identified two letters signed by Gatto, which the Union faxed him pursuant to his request. The first letter, dated September 4 stated:

> This letter is to inform you that Local 854 has represented you in your request for a leave of absence at Consolidated Bus Transit. It is the Union's understanding that the request is for an eighteen (18) month leave of absence to seek other employment.
>
> If you return from the leave of absence any time during the eighteen (18) month period, it is our understanding that your employment at the company will result in no loss of wages and/or benefits.
>
> As per the Collective bargaining Agreement both parties are to mutually agree in granting a leave of absence. Let this serve as the Union's approval of this leave of absence.

The second letter, also dated September 4, changed the middle paragraph above to state that there would be no loss of "wages, seniority, or benefits." Guzman testified that he insisted on the correction telling the Union that if he did not get the language he wanted then he would stay at Consolidated.

Gatto recalled that on Friday September 5 Guzman called the Union office and asked that the Union fax a corrected letter to him with language that he specified. This was done.

On Friday, September 5, 2003 Guzman went to the Department of Education Office of Pupil Transportation and filed an official form to have his records amended, as of "9.5.03" to reflect a change in employment from Consolidated to Parochial, the official name of New York Bus. Guzman testified that he did this in the morning.

Guzman testified that at noon on September 5 he went to Toya's office to get a letter prepared by the company lawyer. Toya said she did not know when she would have the letter because the lawyer was in court. Then, according to Guzman, Toya told him the letter had been faxed when no such thing had occurred. Guzman said he tried to obtain the lawyer's

number from Strippoli. When Strippoli was unable to provide him with the telephone number, Guzman told Strippoli that he would remain working for Consolidated and he would see him Monday. Guzman acknowledged that by this point the Board of Education considered him an employee of New York Bus.

The company witnesses recalled the leave of absence process differently from Guzman. Former human resources manager Toya testified that Guzman asked her for two different leaves of absence. In the spring of 2003 Guzman came to Toya's office and requested a personal leave. Toya inquired whether this was for his personal illness or the illness of a family member under the FMLA. Guzman said he was not asking for leave pursuant to the FMLA. Toya informed Guzman that unless it was mandated by the FMLA the company would not grant a personal leave.

Toya recalled that the 2003-2004 school year began on Monday, September 8. On Thursday morning, September 4, Guzman asked Toya for personal leave. Toya asked whether this was a medical leave under the FMLA. When Guzman informed her that he was not requesting a medical leave, Toya responded that she could not grant him a personal leave. Guzman insisted, saying that he was the shop steward and he should be treated differently from other employees. Toya replied that only Curcio could give Guzman a personal leave and she took Guzman to Curcio's office. Curcio asked Guzman if something was wrong and Guzman said he just needed a leave. After Curcio pushed Guzman for an answer, Guzman stated that he needed the leave to look into another position. Guzman said he wanted to work for New York Bus and that he had an 18 month probationary period there, but that he was only asking for a 12 month leave. Curcio said he could not grant a leave for an employee to look for another job. At that point Toya reminded Curcio that two employees had obtained civil service jobs with the Transit Authority which had a 3 month probationary period and that the company had denied those two employees a leave of absence for their probations. Guzman persisted in his request and finally Curcio said they were getting nowhere and the meeting should end. Toya and Guzman walked to her office where Guzman gave her his cell phone number and a number for his lawyer and asked Toya to call if anything should change. Toya agreed. Guzman also gave Toya a form of letter granting the leave of absence that he wanted typed and signed. Respondent did not give Guzman an executed copy of the letter. The next day, on Friday afternoon, Guzman called Toya and asked if there were any news. Toya said there was no news. Toya did not think she saw Guzman on Friday, but she was not able to so testify with complete assurance.

Toya testified that she did not see Gatto on Thursday and did not get a fax for Guzman while Guzman was in her office.

Right after the meeting with Guzman and Curcio, Curcio instructed Toya to telephone Jim O'Reilly at New York Bus. Toya called O'Reilly and told him that she was calling for Consolidated and asked if a certain person was working at New York Bus. Toya gave O'Reilly Guzman's name and social security number. After a while O'Reilly called Toya and said that Guzman had been working for New York Bus and that he was going to get a run for the school year.

Curcio's recollection of the meeting with Toya and Guzman was similar to Toya's. He recalled that Guzman said he wanted a leave for a personal reason and then explained that he wanted to work for New York Bus. Guzman did not inform Curcio that he had already begun working for New York Bus. Curcio emphasized that "definitely we do not give leaves to try other jobs." Guzman was adamant in requesting his leave and Curcio ended the meeting saying it was not going anywhere. Curcio recalled that Guzman kept saying, "I'll be back Monday, I'll be

back Monday."

Curcio also testified that during the last week of August, the same week as the drivers' pick for the school year routes, he had called O'Reilly and asked him to check whether a driver named Jose Guzman had applied for a job. O'Reilly said there was a person with the same name and social security number at his company. According to Curcio, he spoke to O'Reilly again, and the latter told him Guzman had been working for New York Bus Tours from July 14 and had finished a month-long training course. He had picked a school year run to begin September 8. O'Reilly asked whether Curcio had a problem with losing a driver and whether there were any safety issues with Guzman. Curcio did not explain why he called O'Reilly in August, but Toya testified that Curcio had heard a rumor that Guzman was working for New York Bus in the summer of 2003.

Before a driver commences driving a route for the school year he performs a dry run to familiarize himself with the location of the pupils' homes and the time it takes to drive to the schools which they attend. Guzman testified that he did the dry run for the Consolidated route he had obtained at the August 27 pick three days after the pick. Guzman could not recall the date but he said it was on the weekend preceding the beginning of school. Guzman used his own car for the dry run. He did not inform management that he did the dry run, but this was in accord with his usual practice. Guzman also did the dry run for his New York Bus route using his car on that same weekend preceding Monday, September 8.

On Monday September 8, the first day of school, Toya spoke to O'Reilly again. He told her that Guzman had been driving summer runs for New York Bus since July 14 and that he had worked a school route that morning. That day Guzman came to Toya's office at about 9 or 10 AM. Toya knew that Guzman had not driven for Consolidated that morning.[58] Toya asked Guzman why he was there. Guzman asked Toya whether he had his leave of absence. Toya, who had already spoken to New York Bus, told Guzman that he did not work for her company any more because he was driving for New York Bus. Toya testified that at some point that day Strippoli told her that Guzman came to the yard and informed someone that he was sick.

Curcio said that on September 8 he inquired at the Bronx terminal whether Guzman had appeared for work and he was told that Guzman did not come to work that day.

Strippoli, who testified that he had no contact with Guzman the week before school began, testified that he was in the Fordham yard at 5:30 AM on September 8 and that he did not see Guzman that day. Strippoli thought Guzman was going to report to work. Dispatcher Tom Doherty informed Strippoli that Guzman was not coming and that the route was going to be covered by a shape.

Oyante Silvestre was to have been Guzman's escort for the Consolidated route beginning September 8. She arrived at the yard Monday morning at 5:55 AM. She did not see Guzman in the place where the drivers pick up their trip cards before driving their routes. Silvestre asked if her driver were there and she was told he was not. Silvestre remained at the yard until 9 AM and she did not see Guzman in all that time. Shape driver Ashram Sookraj was given the paperwork for Guzman's run on the afternoon of Friday, September 5. Sookraj began the run at 7 AM on September 8. He did not see Guzman at the yard or in the office that day and no one told him that Guzman was there.[59]

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[58] Guzman would have reported at 6 or 6:15 AM to drive his bus.

[59] Silvestre and Sookraj were called by General Counsel. I credit their testimony.

Guzman offered a different version of the events of Monday, September 8. Guzman testified that he reported to the Fordham yard of Consolidated ready to work at 6 AM. Guzman could not find his time card and then he was told he could not drive for Consolidated. So Guzman went home and put on his New York Bus uniform and reported to work at New York Bus. At the end of his route, Guzman went to Toya's office in Brooklyn and complained that he had not gotten a letter confirming his leave of absence. Guzman told Toya that if he did not get the letter he would continue working for Consolidated. Toya told Guzman that he had resigned.

Guzman testified that his New York Bus route began at 7 AM and that he reported to New York Bus at 6:30 AM and his route ended at 8 AM. However, Guzman's daily trip card for New York Bus shows that he arrived at one school at 8:25 AM and another school at 9:10 AM. Both of these schools are in the Bronx. Guzman's affidavit states that he saw Toya at 8:30 AM. Toya's office is in Brooklyn. Guzman explained this by saying that he left the Bronx for Brooklyn at 8:30 AM. Of course this cannot be correct since Guzman was delivering pupils to a school at 9:10 AM. Guzman also testified that he spoke to Toya in the Brooklyn office at 10 AM on September 8.

Guzman testified that he informed Gatto that he had a recording of the conversation with Curcio in which Curcio agreed to give him a leave of absence to seek another job. He asked Gatto to be a witness that he had an agreement with the company for a leave of absence. Pursuant to Gatto's instructions Guzman spoke to Union counsel Wendell Shepherd, Esq. Guzman told Shepherd what had happened concerning his leave of absence. She took notes and she asked to hear the tape. Guzman told her he did not have it with him. Shepherd later telephoned Guzman and asked for the tape. According to Guzman he told Shepherd that he would not give her the tape because "the Union and the company are like brothers." Eventually, Guzman told Shepherd that there was no tape. Guzman admitted that he lied when he told Gatto and Shepherd about a purported tape.

Gatto testified that Guzman filed a grievance because the company had reneged on an agreement to grant him the 18 month leave of absence. Guzman wanted the Union to take the case to arbitration and he said he had proof the company had indeed agreed to the leave. Gatto told Guzman to cooperate with the Union investigation, and Gatto promised to testify for Guzman if he provided proof that the company had agreed to his 18 month leave. Guzman did not provide the proof he claimed to have in his possession and Gatto did not think the Union would win without it. Gatto decided that the Union would not arbitrate the grievance because there was no proof the company had ever agreed to an 18 month leave of absence.

Discussion of Alleged Unfair Labor Practices

The General Counsel alleges that Local 854 arbitrarily and invidiously refused to process Guzman's grievance because of his dissident activities on behalf of TDU and his other protected and concerted activities.

I have found above that Guzman is not a credible witness. In this instance, Guzman's testimony about his request for a leave and his actions in accepting employment at New York Bus are not only internally inconsistent but also in conflict with the documentary record. Guzman testified to a series of attempts to work for New York Bus at the same time that he was running for shop steward in the Local 854 unit at Consolidated. Guzman made a point of stating that he turned down work at the Local 1181 shop acquired by the Consolidated because he would be "selling himself". In fact, he was already employed at New York Bus and was about to begin a permanent run for the school year. Guzman's testimony about when he knew he would

be permanently employed by New York Bus was shifting, moving from August 20, the day of the New York Bus pick, to the last day of August, to the morning of September 8. This would be reason enough to discredit all of his testimony on that subject. Moreover, the documentary evidence shows that on September 4 Guzman obtained an officially executed form from Consolidated showing that he had resigned his employment. On September 5 Guzman completed the official paperwork at the Office of Pupil Transportation of the New York City Department of Education to show that the identity of his employer had changed from Consolidated to New York Bus. Thus, it is clear that at least by September 4 Guzman knew that he would be working permanently for New York Bus.

It is impossible to avoid the conclusion that Guzman knew he had a permanent route at New York Bus all the time he was continuing his efforts to obtain an 18 month leave of absence from Consolidated as insurance in case he should not complete his lengthy probationary period at New York Bus.

There is no reliable evidence that Guzman had ever secured Consolidated's agreement to an 18 month leave of absence. Curcio and Toya, the latter no longer employed by Consolidated, both testified credibly that Curcio never agreed to such a leave. Gatto testified that he never informed Guzman that the company agreed to a leave. I credit Toya that the company had turned down prior requests from other employees who needed a leave of absence to complete a probationary period with another employer.

I do not credit Guzman's testimony that Gatto told him the company had agreed to a leave of absence and that he would get a letter confirming this. Rather, I find that Gatto testified truthfully about this incident. I do not credit any of Guzman's testimony that Toya promised him a letter from the company lawyer granting a leave of absence nor do I believe that Guzman spoke to Strippoli about his matter. I credit the testimony of Curcio and Toya that Guzman was told he could not have a leave of absence to complete a probationary period with New York Bus.

Finally, Guzman's testimony about presenting himself for work at Consolidated at 6 AM and then at New York Bus at 6:30 AM and the rest of the chronology of that morning as given by Guzman defy credence. Not one witness saw Guzman appear ready to drive his route at Consolidated on September 8, not even the witnesses called by General Counsel. I do not credit Guzman that he went to the Fordham yard at 6 AM on September 8. Rather, I believe that Guzman was carrying on an elaborate charade designed to obtain an 18 month leave from Consolidated in case his job at New York Bus did not work out.

As discussed above, by September 4, Antoci knew that Guzman had resigned by means of an official Department of Education form. Thus, it is not surprising that a shape driver was told on the afternoon of September 5 to do Guzman's chosen run beginning on September 8. Indeed, by September 5, Guzman had completed his official filing at the Department of Education to resign from Consolidated and become an employee of New York Bus.

I credit Gatto that the Union did not proceed with Guzman's grievance because Gatto believed that there was no evidence to support it. First, Gatto knew that Curcio had never told him that the company was granting Guzman an 18 month leave of absence. Then, it is clear that Guzman had no evidence at all to support his story that Curcio had initially agreed to give him a leave but had unfairly failed to grant it. Indeed, Gatto had ample reason to believe that the whole story told by Guzman was untrue. Guzman showed that he was all too willing to lie repeatedly both to the Union president and the Union attorney who were investigating his claim. Guzman spoke to them about a non existent tape, giving various excuses for his failure to

produce it including that the Union and the company were colluding against him.

I note that the officers and agents of Local 854 have shown themselves to be quite ready to represent Guzman and take his meritorious claims through the grievance procedure and to arbitration where necessary. Thus, the Union obtained full relief for Guzman and Fleurimont when they were suspended in September 2002, the Union filed a grievance on behalf of Guzman in October 2002 and the Union grieved and successfully arbitrated Guzman's suspension in November 2002. In the matter of the leave of absence, Gatto complied with Guzman's request to help him obtain the leave and the Union willingly gave Guzman four versions of the letter he wanted, quickly making corrections each time Guzman asked for them.

I find that Local 854 did not unlawfully fail to proceed with Guzman's grievance about being promised and then denied a leave of absence.

N. Other Complaint Allegations

Certain allegations set forth in the Consolidated Complaint were not urged by General Counsel in the Brief. Among these was an allegation that Respondent Consolidated, on or about May 29, 2002 unlawfully required Fleurimont to take a blood test more frequently than required. Apparently all drivers are required to take an annual physical exam including a blood test, but there was no detailed evidence on this issue. Fleurimont testified that he suffered from diabetes and he acknowledged that his condition required more frequent blood tests than are given to drivers who are not diabetic. Fleurimont maintained that after submitting the results of a test in June 2002 he was required to take another test. Fleurimont did not ask anyone the reason for this request and he agreed that it might have been due to unsatisfactory blood sugar results on the first test. General Counsel introduced no documentary evidence to show the dates on which Fleurimont was tested. Fleurimont was not an accurate witness with respect to dates and he did not provide any specifics to back up his claim that he was tested more often than required. There is no competent evidence to show that Fleurimont was discriminated against with respect to taking blood tests.

The Complaint alleges that on January 8, 2003 Respondent Consolidated disciplined Fleurimont. The record contains a written warning Fleurimont received for leaving his key in the school bus ignition on the morning of December 24, 2002. Fleurimont wrote on the warning slip "I am signing under protest." Fleurimont testified during the instant hearing in 2004 that he had taken the key home with him. However, he did not write this explanation on the written warning at the time it was presented to him. Fleurimont was not suspended for this incident and he did not file a grievance. Given my conclusions about Fleurimont's general lack of credibility, I find that there is insufficient evidence about this warning in the record on which to base any finding of unfair labor practices. General Counsel introduced no evidence to show why taking the key home was better than or different from leaving it in the ignition, and there is no argument in the General Counsel's brief addressed to this allegation.

Conclusions of Law

1. By coercively interrogating employees about their protected concerted and union activities, conducting surveillance of employees' protected concerted and union activities and threatening employees with suspension, discharge, arrest and unspecified retaliation because they engaged in protected concerted and union activities, Respondent Consolidated violated Section 8 (a) (1) of the Act.

2. By suspending employees Jose Guzman and Jona Fleurimont because they

engaged in protected concerted and union activities, Respondent violated Section 8 (a) (3) and (1) of the Act.

3. By subjecting employees to closer supervision because they engaged in protected concerted and union activities, Respondent violated Section 8 (a) (3) and (1) of the Act.

4. By issuing written warnings to employees Jona Fleurimont and Juan Carlos Rodriguez because they engaged in protected concerted and union activities, Respondent violated Section 8 (a) (3) and (1) of the Act.

5. By singling out employees for testing because they engaged in protected concerted and union activities, Respondent violated Section 8 (a) (3) and (1) of the Act.

6. The General Counsel has not shown that Respondent Consolidated engaged in any other violations of the Act.

7. The General Counsel has not shown that Respondent Local 854 engaged in any violations of the Act.

Remedy

Having found that Respondent Consolidated has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent unlawfully suspended and issued written warnings to various employees named above. Although it appears that the employees may have been made whole for the unlawful suspensions, it is possible that this has not occurred to the full extent mandated by the Board. Further, it is not clear that the suspensions or the warnings have been removed from the employees' files. Therefore I shall issue the standard remedial order for the unlawful conduct. The Respondent having discriminatorily suspended employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I have found above that Respondent Consolidated unlawfully singled out Juan Carlos Rodriguez for 19 A testing on March 19, 2003. I have also found that the certified examiners were not told to fail Rodriguez and that he failed both tests as described, respectively, by the certified examiners on March 19 and March 27, 2003. Because Rodriguez failed the tests he was disqualified from driving a school bus for Respondent Consolidated until such time as he took and passed another 19A test. Rodriguez was advised to take another test by Consolidated and by Local 854, but he did not do so. It is appropriate to issue a cease and desist order barring the company from singling out for testing employees who engage in protected activity. However, I do not believe that a make whole order is appropriate in the circumstances. Manifestly, I cannot order Respondent Consolidated to offer Rodriguez his job back while he is not lawfully permitted to drive a school bus in New York State. *NLRB v. Future Ambulette*, 903 F.2d 140, 145 (2nd Cir. 1990); *De Jana Industries*, 305 NLRB 845 (1991). Further, Rodriguez has a duty to mitigate damages even though he was the victim of an unfair labor practice. As the Board stated in *De Jana*, a discriminatee "must with reasonable diligence: seek interim employment…; attempt to secure an appropriate driver's license; and, if necessary, seek

substantially equivalent employment elsewhere." Under this standard, I cannot order backpay for Rodriguez. Rodriguez had a duty to take and pass another 19A exam within a reasonable amount of time. He made no effort to do so and the record contains no explanation for his failure to make himself employable as a school bus driver from March 2003 until May 2004 when he testified herein. Indeed, I see no reason why Rodriguez could not have claimed his old job from the company as soon as he had passed another 19A test. Rodriguez had not been discharged by Respondent Consolidated, he had merely been disqualified from driving until he passed another 19A test.[60] This case is distinguishable from the facts in *De Jana* where the employer knowingly permitted drivers to work without a valid license. In the instant case, there is no evidence that Respondent Consolidated ever permitted an employee to drive a school bus without having passed the required 19A test.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[61]

ORDER

The Respondent, Consolidated Bus Transit, Inc., 50 Snedicker Avenue, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their protected concerted and union activities, conducting surveillance of employees' protected concerted and union activities and threatening employees with suspension, discharge, arrest and unspecified retaliation because they engage in protected concerted and union activities.

(b) Suspending employees because they engage in protected concerted and union activities.

(c) Subjecting employees to closer supervision because they engage in protected concerted and union activities.

(d) Issuing written warnings to employees because they engage in protected concerted and union activities.

(e) Singling out employees for testing because they engage in protected concerted and union activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[60] I note that Rodriguez had obtained a form from his insurance company stating that he was actively licensed to drive a school bus but this form is not an official New York State form. There is no record evidence that the company could have waived the requirement that Rodriguez take and pass another 19A test on the basis of this insurance company form.

[61] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Jose Guzman and Jona Fleurimont whole for any loss of earnings and other benefits suffered as a result of their unlawful suspensions, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspensions, and within 3 days thereafter notify the employees in writing that this has been done and that the suspension will not be used against them in any way.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful written warnings issued to Jona Fleurimont and Juan Carlos Rodriguez, and within 3 days thereafter notify the employees in writing that this has been done and the warnings will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in the Bronx and in Brooklyn, New York, copies of the attached notice, in English, Spanish and French, marked "Appendix."[62] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 17, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found, and

[62] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that Case No. 2-CA-36492 is severed from all the above-captioned cases for purposes of issuing the decision.

Dated, Washington, D.C.

_____
Eleanor MacDonald
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coercively interrogate you about your protected concerted and union activities.

WE WILL NOT conduct surveillance of your protected concerted and union activities.

WE WILL NOT threaten you with suspension, discharge, arrest or unspecified retaliation because you engage in protected concerted and union activities.

WE WILL NOT suspend you, subject you to closer supervision, issue written warnings to you or single you out for testing because you engage in protected concerted and union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Jose Guzman and Jona Fleurimont whole for any loss of earnings and other benefits suffered resulting from their unlawful suspensions.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspensions of Jose Guzman and Jona Fleurimont, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspension will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful written warnings issued to Jona Fleurimont and Juan Carlos Rodriguez, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the written warnings will not be used against them in any way.

_____
Consolidated Bus Transit, Inc.

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.